

DOCKET

o. 83-1622-CFX
Status: GRANTED

Title: Elizabeth Brandon, et al., Petitioners
v.
John D. Holt, etc., et al.

Docketed:
March 30, 1984

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Schnapper, Eric

Counsel for respondent: Klein, Henry L.

| entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|--|
| 1 | Feb 21 1984 | | Application for extension of time to file petition and order granting same until March 31, 1984 (O'Connor, February 22, 1984). |
| 2 | Mar 30 1984 | G | Petition for writ of certiorari filed. |
| 3 | Apr 30 1984 | | Brief of respondents John D. Holt, et al. in opposition filed. |
| 4 | May 2 1984 | | DISTRIBUTED. May 17, 1984 |
| 5 | May 21 1984 | | Petition GRANTED. |
| 7 | Jul 9 1984 | | ***** Order extending time to file brief of respondent on the merits until July 12, 1984. |
| 8 | Jul 12 1984 | | Brief amicus curiae of United States filed. |
| 9 | Jul 13 1984 | | Brief of petitioners Elizabeth Brandon, et al. filed. |
| 10 | Jun 13 1984 | | Joint appendix filed. |
| 12 | Aug 10 1984 | | Order extending time to file brief of respondent on the merits until August 20, 1984. |
| 13 | Aug 20 1984 | | Brief of respondents John D. Holt, et al. filed. |
| 14 | Aug 28 1984 | | SET FOR ARGUMENT. Monday, November 5, 1984. (4th case) |
| 15 | Aug 29 1984 | | CIRCULATED. |
| 16 | Oct 25 1984 | X | Reply brief of petitioners Elizabeth Brandon, et al. filed. |
| 17 | Nov 5 1984 | | ARGUED. |

**PETITION
FOR WRIT OF
CERTIORARI**

83 - 1622

No.

Office - Supreme Court, U.S.

FILED

MAR 30 1984

ALEXANDER L. STEVENS

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELIZABETH BRANDON, *et al.*,

Petitioners,

v.

JOHN D. HOLT, *etc., et al.*

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ELIZABETH A. MCKANNA
686 W. Clover Drive
Memphis, Tennessee 38119

G. PHILIP ARNOLD
300 E. Main Street
P.O. Box 760
Ashland, Oregon 97520

WILLIAM E. CALDWELL
731 Center Drive
Memphis, Tennessee 38112

JACK GREENBERG
ERIC SCHNAPPER*
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioners

*Counsel of Record

84 pp

QUESTION PRESENTED

Did the Court of Appeals err in holding that a monetary judgment under Rule 25(d), F.R.C.P., against a public official "in his official capacity" imposes personal liability on the official which he must pay out of his own pocket?

PARTIES

The plaintiffs in this action are Elizabeth A. Brandon and James D. Muse. The original defendants were E. Winslow Chapman, in his official capacity as Director of Police for the City of Memphis, and Robert J. Allen. While the case was pending in the court of appeals, John D. Holt replaced E. Winslow Chapman as the Director of Police, and was thus substituted for him as a defendant by operation of Rule 43(c)(1), Federal Rules of Appellate Procedure.

The practical issue posed by the Question Presented is whether any judgment against Holt or Chapman in his official capacity operates as a judgment against the City of Memphis.

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| Question Presented | i |
| Parties | ii |
| Table of Contents | iii |
| Table of Authorities | iv |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Rules Involved | 3 |
| Statement of the Case | 5 |
| Reason for Granting the Writ | 12 |
| Certiorari Should Be Granted To Resolve A Conflict Among the Cir- cuits Regarding the Effect of a Judgment Against A Public Employee "In His Official Capacity" ... | 12 |
| Conclusion | 29 |
| APPENDIX | |
| District Court Findings of Fact, Conclusions of Law, and Order, July 8, 1981 ... | 1a |
| Opinion of the Court of Appeals, October 11, 1983 | 29a |
| Order of the Court of Appeals Denying Petition for Rehear- ing En Banc, December 2, 1983 | 45a |

TABLE OF AUTHORITIES

| <u>Cases:</u> | <u>Page</u> |
|--|---------------|
| Bertot v. School Dist. No. 1, Albany County, 613 F.2d 245 (10th Cir. 1979) | 25 |
| Campbell v. Bowlin, 724 F.2d 484 (5th Cir. 1984) | 23 |
| Family Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) | 23,26 |
| Gay Student Services v. Texas A. & M. University, 612 F.2d 160 (5th Cir. 1980) | 23 |
| Hughes v. Blankenship, 672 F.2d 403 (4th Cir. 1982) | 22 |
| Irwin v. Wright, 258 U.S. 219 (1922) | 13 |
| Key v. Rutherford, 645 F.2d 880 (10th Cir. 1981) | 25,27 |
| Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982) | 24 |
| McGhee v. Draper, 639 F.2d 639 (10th Cir. 1981) | 25,27 |
| Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) | <u>passim</u> |
| Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981) | 24 |

Page

| | |
|---|---------------|
| Owen v. City of Independence, 445 U.S. 622 (1980) | <u>passim</u> |
| Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980) | 22 |
| Scheuer v. Rhodes, 416 U.S. 232 (1974) | 20,25-26 |
| Snyder v. Buck, 340 U.S. 15 (1950) | 12 |
| United States ex rel. Bernardin v. Butterworth, 169 U.S. 600 (1897) | 13 |
| Universal Amusement Co. v. Hofheinz, 646 F.2d 996 (5th Cir. 1981) ... | 23,26 |
| Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980) | 23,24 |
| Wolf-Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1983) | 24 |
| <u>Statutes:</u> | |
| 28 U.S.C. § 1254(1) | 2 |
| 42 U.S.C. § 1983 | 7 |
| 30 Stat. 822 | 13 |
| 43 Stat. 936 | 13 |

Other Authorities

3B Moore's Federal Practice ¶ 25.01
[13]

14

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

ELIZABETH BRANDON, et al.,
Petitioners,

v.

JOHN D. HOLT, etc., et al.

=====

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

=====

Petitioners Elizabeth A. Brandon
and James D. Muse respectfully pray
that a Writ of Certiorari issue to review
the judgment and opinion of the United
States Court of Appeals for the Sixth
Circuit entered in this proceeding on
October 11, 1983.

OPINIONS BELOW

The decision of the Court of appeals is reported at 710 F.2d 151, and is set out at pp. 28a-43a of the Appendix. The order denying rehearing, which is not reported, is set out at p. 44a. The district court Findings of Fact, Conclusions of law and Order are reported at 516 F. Supp. 1355, and are set out at pp. 1a-27a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1983. A timely petition for rehearing was filed, which was denied on December 2, 1983. On February 22, 1984, Justice O'Connor granted an order extending the date on which the petition for writ of certiorari is due until March 31, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 25(d), Federal Rules of Civil Procedure, provides:

(d) Public Officers; Death or Separation from Office

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

Rule 43(c)(1), Federal Rules of Appellate Procedure, provides:

(c) Public Officers; Death or Separation from Office

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall not be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

Supreme Court Rule 40.3 provides:

When a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an

order shall not affect the substitution.

STATEMENT OF THE CASE

This case arose from the deliberate policy of Memphis police authorities of refusing to discipline or dismiss police officers whom they knew to be dangerously violent. The particular officer in this case, Robert Allen, had in the words of the District Court a

reputation for displaying maladaptive behavior well known among Police officers in his precinct. ... Allen's reputation as a "mental case" was widespread among the officers. (8a)1/

Allen ceremoniously put on what he referred to as his "killing gloves" when called to the scene of a crime, and expressed a morbid fascination with the wounds of a man

1/ See also 26a-27a (Allen's "dangerous propensities were widely known among officers of the Department").

he had killed (Id.). By 1977 Allen's personnel records contained some 20 complaints of abuse of authority and unnecessary force (11a). Allen's behavior was so bizarre that none of his fellow officers were willing to ride in a squad car with him (9a). The City of Memphis, however, armed Allen with a gun and a badge and set him loose on the citizens of the city.

This inexplicable practice led to a predictably tragic result on the night of March 5, 1977. At 11:30 p.m. that evening two high school students, Elizabeth Brandon and James Muse, were on a date and parked, as young couples are wont to do, in a secluded area. Allen, after identifying himself as a Memphis police officer, ordered Muse to step out of the car. After briefly questioning him, Officer Allen maliciously, and without provocation, assaulted Muse with a knife, stabbing

him in the neck and ear. When Officer Allen tried to break into the car where Ms. Brandon was seated, Muse jumped into the driver's side and quickly drove away. Officer Allen then drew his service revolver and shot at the fleeing couple. The bullet shattered a window in the car and struck Brandon in the face. Muse required surgery for his wounds, and was permanently disfigured. (5a-8a). Neither Brandon nor Muse were ever charged with or suspected of any offense; Officer Allen was ultimately indicted and convicted of assault with intent to murder in connection with this incident.

Petitioners Brandon and Muse commenced this action in the United States District Court for the Western District of Tennessee, alleging a violation of their rights under 42 U.S.C. § 1983 and the Fourteenth Amendment. Petitioners named as defendants

Officer Allen and the Director of the Memphis Police Department, then E. Winslow Chapman. Allen, who by then had finally left the Memphis Police Department, never appeared or answered the complaint. A default judgment was subsequently entered against Allen, but he was in jail when this case came to trial, and apparently lacks significant personal assets. The litigation therefore proceeded to trial against Director Chapman "in his official capacity."

The district judge found that the responsible Memphis authorities engaged in several official practices which predictably led to Allen's assault on petitioners. First, it was the express practice of Director Chapman not to take disciplinary action against officers known to engage in unlawful violent conduct. (14a, 23a). Second, there was a "code of silence among

the officers" pursuant to which no members of the force would testify regarding known misconduct by their colleagues. (14a, 22a). Third, the internal procedures established by Director Chapman imposed on supervisory officers no duty to investigate or report on dangerous propensities on the part of their subordinates. (12a-13a). Fourth, it was Director Chapman's policy not to read citizen complaints of police misconduct sent to his office. In Allen's case, for example, Chapman had signed letters to two complainants stating that Allen's behavior was being investigated (22a-23a); Chapman testified under oath, however, that he had never heard of Officer Allen prior to the assault on petitioners, and that he was unaware of the charges against Allen about which he had written to the two earlier complainants. (13a, 20a). Based on these subsidiary findings the

district judge held that Director Chapman should have known about and taken steps to curtail Allen's violent conduct, and awarded damages against Chapman "in his official capacity". (22a-27a). The district court understood that that award was in fact a judgment against the city of Memphis, noting that an "official capacity" suit is "an action against an entity of which an officer is an agent" (16a).

While the case was on appeal Chapman left office, and was replaced as Police Director by John D. Holt. Since the lower court decision was against Chapman "in his official capacity", Holt was automatically substituted as the named defendant by operation of Rule 43(c)(1), Federal Rules of Appellate Procedure. On October 11, 1983, the court of appeals held that a judgment against a public official "in his official capacity" was as a matter

of law a judgment against the official as an "individual" (38a), to be paid out of his own pocket. The Sixth Circuit thus reasoned that, although the city of Memphis could claim no good faith immunity in light of Owen v. City of Independence, 445 U.S. 622 (1980), Director Chapman "in his official capacity" was entitled to invoke that defense. Although the trial court had never considered or decided whether Chapman had acted in good faith, the Sixth Circuit proceeded to consider this factual issue nisi prius, and held that Chapman had demonstrated the requisite good faith. (38a). Accordingly, the court of appeals directed that the claim against him "in his official capacity" be dismissed. (33a).

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted To
Resolve A Conflict Among the Cir-
cuits Regarding the Effect of a
Judgment Against a Public Employee
"In His Official Capacity"

The Sixth Circuit decision in this case creates in a single blow the procedural and substantive problems regarding "official capacity" actions which Justice Frankfurter a generation ago characterized as a "legal snarl ... compounded of confusion and artificialities."^{2/} For at least a century prior to 1961 uncertainty about when suits against public officials were to be treated as suits against the entities for which they worked divided this Court,^{3/} confused the lower courts and ensnared unwary litigants. Repeatedly

^{2/} Snyder v. Buck, 340 U.S. 15, 22 (1950) (dissenting opinion).

^{3/} See, e.g. id.

pointing to the procedural problems posed by suits against public employees in their official capacities, this Court on several occasions successfully called upon Congress to adopt clarifying legislation.^{4/} These problems, the Court emphasized, imposed unreasonable burdens on the courts and litigants alike.

Under the present state of the law, an important litigation may be begun and carried through to this court after much effort and expense, only to end in dismissal....^{5/}

Despite the enactment of legislation in 1899^{6/} and 1925,^{7/} and the provisions of the Rule 25 of the 1937 Federal Rules of Civil Procedure, these problems continued

^{4/} Irwin v. Wright, 258 U.S. 219, 223, 224 (1922); United States ex rel. Bernardin v. Butterworth, 169 U.S. 600, 605 (1897).

^{5/} Irwin v. Wright 258 U.S. at 224.

^{6/} 30 Stat. 822, ch. 121.

^{7/} 43 Stat. 936, 941, ch. 229.

until 1961. In 1961 the Advisory Committee noted that Rule 25 as it then existed was "generally considered to be unsatisfactory," operating at times as "a trap for unsuspecting litigants which seems unworthy of a great government."^{8/}

Rule 25(d) was amended in 1961 in the hope of ending once and for all the snarl of which Justice Frankfurter had complained. As amended Rule 25(d) expressly recognized and regulated actions which were "brought in form against a named officer, but intrinsically against the government."^{9/} The Committee Note explained that in a Rule 25(d) action against an officer "in his official capacity" any judgment was to provide "relief ... by the

^{8/} Quoted in 3B Moore's Federal Practice, ¶ 25.01 [13].

^{9/} Id.

one having official status, rather than one who has lost that status and power through ceasing to hold office."^{10/} Rule 25(d) "official capacity" actions were by definition limited to litigation seeking relief against whichever official might hold the office. A plaintiff seeking a monetary award to be paid by the government is directed by Rule 25(d) to sue the relevant official "in his official capacity"; that Rule is inapplicable to a suit seeking to compel a defendant official "to ... pay damages out of [his] own pocket[]." ^{10a/} Since an "official capacity" defendant is merely a representative of the entity for which he works, Rule 25(d) provides that if a new official is appointed to the position of the named defendant, that new official

^{10/} Id.

^{10a/} Id.

will automatically be substituted as the nominal defendant.

This Court has twice held that in a Rule 25(d) action against an official "in his official capacity" any monetary award runs against the public entity for which the official works, not against the official personally. In Monell v. New York City Department of Social Services, 436 U.S. 658, 690 n. 55 (1978), the Court explained:

Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent ... our holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which, as here, a local government would be suable in its own name.

Because it regarded a suit against an official in his official capacity as a

judgment against the governmental entity for which he worked, the Court in Monell held such "official capacity" suits proper when, but only when, the entity itself could be sued.

A similar conclusion with regard to good faith immunity was reached in Owen v. City of Independence, 445 U.S. 622 (1980). The plaintiff in that case had sued the city of Independence and certain city officials "in their official capacities." 445 U.S. 630. In upholding an award of backpay this Court emphasized:

The governmental immunity at issue in the present case differs significantly from the official immunities involved in our previous decisions. In those cases, various government officers had been sued in their individual capacities Here, in contrast, only the liability of the municipality itself is at issue, not that of its officers 445 U.S. 638 n. 18 (Emphasis added).

Thus both for purposes of jurisdiction under Monell, and in assessing a claim of immunity under Owen, this Court has adhered to the intent of the drafters of Rule 25(d) and treated an action against an official "in his official capacity" as an action against the entity for which he works.

The instant case was litigated, tried, and adjudicated as an action against the Memphis Director of Police "in his official capacity." The District Judge emphasized at three separate points in his Findings of Fact and Conclusions of Law that the Director was sued "in his official capacity."^{11/} The Magistrate to whom the judge referred the calculation of damages noted that the court had found Director

^{11/} 1a, 16a, 25a.

Chapman liable "in his official capacity."^{12/} The district judge clearly contemplated that the damages which he had awarded would be paid by the city of Memphis, not by Director Chapman personally. Quoting this Court's opinion in Monell, Judge Horton declared that an "official capacity suit[] ... represent[s] only another way of pleading an action against an entity of which an officer is an agent."^{13/}

The Sixth Circuit, disregarding both the controlling decisions of this Court and the manifest intent of the district court's order, held that the litigation against Director Chapman "in his official capacity ... is a suit against the indi-

^{12/} Joint Appendix, Nos. 83-5321 and 83-5346, p. 70.

^{13/} 16a.

vidual, not the city."^{14/} The court of appeals applied to such an "official capacity" lawsuit the executive immunity standards of Scheuer v. Rhodes, 416 U.S. 232 (1974),^{15/} and its progeny, despite the fact that footnote 18 in Owen clearly indicated that Scheuer was inapplicable to such "official capacity" actions. In denying rehearing, the appellate panel reiterated that an award of damages "against a police official in his official capacity" was not "a judgment against the city itself," but against the official personally.^{16/}

The patent inconsistency of this conclusion with Rule 25(d) of the Federal Rules of Civil Procedure, and with the

^{14/} 31a, 38a.

^{15/} 45a.

^{16/} 45a.

similar provisions of Rule 43(c) of the Federal Appellate Procedure, is highlighted by the particular circumstances of this appeal. The notice of appeal was filed on May 20, 1982. On December 29, 1982, Chapman was replaced as Director of the Memphis City Police by John D. Holt. Thus in December 1982, by operation of Rule 43(c), Holt was automatically substituted for Chapman as the appellant. When the Sixth Circuit subsequently held, in October 1983, that this action, and the district court judgment appealed from, were against Chapman as an "individual", Chapman was no longer even a party to the litigation, and had not been for over 9 months.

The Sixth Circuit decision in this case is squarely in conflict with the decisions of four other circuits regarding Rule 25(d) "official capacity" lawsuits. The Fourth Circuit has held that in an

action against school board officials in their official capacities any award would be paid "from the school board's treasury."^{17/} That circuit treats "official capacity" suits just as it does actions in which the government entity is the named defendant, applying the immunity rule applicable to local government units^{18/} and requiring proof of the same "policy or custom"^{19/} mandated by Monell in actions against municipalities. The Fifth Circuit has held in 5 separate decisions that "actions for damages against a party in his official capacity are, in essence, actions against the governmental entity of

^{17/} Paxman v. Campbell, 612 F.2d 848, 856 (4th Cir. 1980).

^{18/} Id. at 856-60.

^{19/} Hughes v. Blankenship, 672 F.2d 403, 406 (4th Cir. 1982).

which the officer is an agent."^{20/} For that reason the Fifth Circuit applies to "official capacity" actions the Owen rule that cities enjoy no good faith immunity and the Monell "policy or custom" requirement^{21/} applicable to actions against a municipality. The Fifth Circuit has also expressly held that the due process rights of a county are not violated by compelling it to pay the judgment in an "official capacity" action in which it was never

^{20/} Campbell v. Bowlin, 724 F.2d 484, 489 n. 4 (5th Cir. 1984); see also Universal Amusement Co. v. Hofheinz, 646 F.2d 996, 997 (5th Cir. 1981); Van Ooteghem v. Gray, 628 F.2d 486, 496 (5th Cir. 1980); Family Unidas v. Briscoe, 619 F.2d 391, 403 (5th Cir. 1980); Gay Student Services v. Texas A & M University, 612 F.2d 160, 164 (5th Cir. 1980).

^{21/} Universal Amusement Co. v. Hofheinz, 646 F.2d at 997; Family Unidas v. Briscoe, 619 F.2d at 403; Campbell v. Bowlin, 724 F.2d at 489.

formally named as a party.^{22/} The Seventh Circuit recognizes that "an official capacity suit ... is merely another form of claim against the government entity."^{23/} For that reason

the real defendant in an official-capacity suit is not the named public officer but rather the governmental entity. The government, and not the public officer, is solely responsible for satisfying a judgment rendered against an officer sued in his official capacity. ^{24/}

Thus the Seventh Circuit too applies the Owen^{25/} and Monell^{26/} rules to an "offi-

^{22/} Van Ooteghem v. Gray, 628 F.2d at 495-96.

^{23/} Kincaid v. Rusk, 670 F.2d at 745.

^{24/} Kincaid v. Rusk, 670 F.2d 737, 742 n. 7 (7th Cir. 1982); see also Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981) (under Monell "recovery from the public treasury is possible in cases of government officials being sued in their official capacity.")

^{25/} Kincaid v. Rusk, 670 F.2d at 745.

^{26/} Wolf-Lillie v. Sonquist, 699 F.2d at 870.

cial capacity" action. The Tenth Circuit recognizes that, in light of footnote 55 in Monell,

a judgment against the board members runs against the School District treasury, it is equivalent to a judgment against the District itself.^{27/}

As a consequence, the Tenth Circuit as well applies Owen to such actions.^{28/}

In the instant case the Sixth Circuit, relying on its characterization of "official capacity" suits as personal actions against the named defendants, held that the defendant in such a suit may invoke the "good faith" defense provided by Scheuer v.

^{27/} Bertot v. School Dist. No. 1, Albany County, 613 F.2d 245, 247 n. 1 (10th Cir. 1979); see also Key v. Rutherford, 645 F.2d 880, 883 n. 5 (10th Cir. 1981) ("judgments against local government officials in their official capacities are equivalent to a judgment against the government entity itself.")

^{28/} Key v. Rutherford, 645 F.2d at 883; McGhee v. Draper, 639 F.2d 639, 644 (10th Cir. 1981).

Rhodes, 416 U.S. 232 (1974). The Sixth Circuit thus dismissed all claims against Chapman "in his official capacity," insisting that there was insufficient evidence "that he acted with anything other than good faith."^{29/} Three other circuits, however, have expressly refused to apply the Scheuer v. Rhodes good faith defense to "official capacity" actions. In the Fifth Circuit "Government officials sued in their official capacity may not ... assert good faith immunity."^{30/} The Seventh Circuit has also rejected any good faith defense in such actions:

^{29/} 37a.

^{30/} Universal Amusement Co. v. Hofheinz, 646 F.2d at 997; see also Familias Unidas v. Briscoe, 619 F.2d at 403 ("qualified, good faith immunity insulates defendants only from liability in their individual capacities.... It has no effect on their liability in their official capacities....")

Because an official-capacity suit ... merely represents another form of claim against the government entity itself ... the Owen holding denying the good faith immunity defense has been extended to official capacity suits.^{31/}

Similarly, the Tenth Circuit construes Owen as holding "local government officials in their official capacities liable for compensatory damages regardless of good faith."^{32/}

The decision of the Sixth Circuit in this case thus presents a conflict on issues of recurring importance with the decisions of the Fourth, Fifth, Seventh and Tenth Circuits, and with the decisions of this Court in Monell and Owen. The Sixth Circuit court of appeals has effectively abolished "official capacity"

^{31/} Kincaid v. Rusk, 670 F.2d at 745.

^{32/} McGhee v. Draper, 639 F.2d at 644; see also Key v. Rutherford, 645 F.2d at 883.

actions in the federal courts in Michigan, Ohio, Tennessee and Kentucky; henceforth such actions are to be treated in that circuit as if the defendants were sued in their individual capacities. The decision in this case also abrogates for all practical purposes Rule 25(d) of the Federal Rules of Civil Procedure and Rule 43(c) of the Federal Rules of Appellate Procedure. Equally seriously, the decision below calls into question the manner in which countless "official capacity" actions now pending across the country have been pleaded and tried; it stands as an open invitation to intransigent litigants to recreate the "legal snarl" which this Court thought it had untangled by amending Rule 25(d) two decades ago. Certiorari should be granted to resolve the conflict noted above, and to pretermit the confusion and mischief which the Sixth Circuit opinion portends.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

ELIZABETH A. MCKANNA
686 W. Clover Drive
Memphis, Tennessee 38119

G. PHILIP ARNOLD
300 E. Main Street
P.O. Box 760
Ashland, Oregon 97520

WILLIAM E. CALDWELL
731 Center Drive
Memphis, Tennessee 38112

JACK GREENBERG
ERIC SCHNAPPER*
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioners

*Counsel of Record

APPENDIX

Elizabeth A. BRANDON and James S. Muse,

Plaintiffs,

v.

Robert J. ALLEN and E. Winslow Chapman,

Defendants.

No. C-78-2076.

United States District Court,
W. D. Tennessee, W. D.

July 8, 1981.

G. Phillip Arnold, Memphis, Tenn.,
for plaintiff.

Henry Klein, Memphis, Tenn. for
defendant.

FINDINGS OF FACT, AND CONCLUSIONS OF LAW,
AND ORDER

HORTON, District Judge.

This is a civil action against the Honorable E. Winslow Chapman, in his official capacity as Director of the Memphis Police Department and former Memphis Police Officer Robert J. Allen. Plaintiffs, Elizabeth A. Brandon and James S. Muse, seek actual and punitive damages

from the defendants for an assault and battery committed upon them by ex-officer Allen and for declaratory relief all pursuant to 42 U.S.C. §§ 1983, 1988, and the Fourteenth Amendment of the Constitution of the United States. Due to his failure to appear or answer the charges in the complaint, a default judgment was entered against the defendant Robert J. Allen. The case was heard by the Court on September 29 and 30, 1980.

Plaintiffs allege the following:

- 1) An off-duty police officer acts under color of state law;
- 2) As Director of Police and as an agent of the City of Memphis, Mr. Chapman should have known of Mr. Allen's dangerous propensities;
- 3) Mr. Chapman should have taken steps to dismiss Mr. Allen from the Police Force prior to the

occurrence of the incident involving plaintiffs.

- 4) Policies existed which precluded the Police Department from taking action to discover dangerous propensities among certain officers, and those policies encouraged "cover-up" of police misconduct;
- 5) Mr. Chapman's inaction was the cause of plaintiffs' pain, serious physical and emotional injuries, and property damage, and defendant's inaction denied plaintiffs equal protection of the law;
- 6) Mr. Chapman's willful, wanton and reckless conduct constitutes a basis for an award of punitive damages.

Defendant E. Winslow Chapman, as an agent of the Memphis Police Department, presented the following defense:

- 1) He had no actual knowledge of the dangerous propensities of Officer Robert J. Allen;
- 3) Upon his arrival as Police Director, he instituted a new policy, which provided for his personal involvement in cases of police misconduct;
- 4) Silence among police officers, review by the Civil Service Commission, and provisions of a union contract limited the Police Director's ability to discipline officers;
- 5) Officer Allen's disciplinary record at the time of the incident involving plaintiffs did not warrant dismissal from the Police Force;
- 6) Under the circumstances of this case, it cannot be said that Mr.

Chapman should have known of Mr.

Allen's dangerous propensities.

The Court, pursuant to Rule 52, Federal Rules of Civil Procedure, makes the following findings of fact and conclusions of law:

PINDINGS OF FACT

- 1) On March 5, 1977, at approximately 11:30 p.m. plaintiffs, who were seventeen years of age, drove to the Memphis Hunt and Polo Club while on a date and parked in a dark and secluded driveway area. The driver of the vehicle was plaintiff James S. Muse. After approximately thirty minutes had elapsed, a Chevrolet pickup truck entered the driveway where plaintiffs were parked. The truck proceeded down the driveway and returned a few minutes later, stopping near Mr. Muse's car. The driver of the truck identified himself to plaintiffs as a police officer and showed them

an official police identification card bearing the name and photograph of Robert J. Allen. Mr. Allen was in fact employed as an officer with the Memphis Police Department, but he was off duty at that time. Mr. Allen ordered Mr. Muse to step out of the car. After briefly questioning him, Officer Allen maliciously, and without provocation, struck Mr. Muse in the neck and head with his fist and then stabbed and cut Muse on the neck and ear with a knife. As Officer Allen tried to break into the car where plaintiff Elizabeth A. Brandon was seated, Mr. Muse jumped into the driver's side of the car and quickly drove away. Officer Allen fired a shot at the escaping vehicle with his police revolver. The bullet shattered the front window on the driver's side of the car. Officer Allen followed plaintiffs in a high speed chase which ended at St. Joseph's Hospital East,

where plaintiffs sought medical care and assistance and reported the unprovoked attack upon them by Officer Allen.

2) Miss Brandon was treated in the emergency room for facial cuts caused by the shattered glass. Later, a bullet fragment was removed from her face. Mr. Muse underwent three hours of plastic surgery and was hospitalized for two days. He was required to return to his physician periodically for additional treatment. Mr. Muse still has scars on his face.

3) Both plaintiffs have suffered great physical pain and anguish as a result of the incident. Miss Brandon testified that she has experienced nightmares, headaches, irritability, impatience, withdrawal, fear, and emotional distress. Mr. Muse testified that he has had difficulty sleeping since the incident. He has suffered fear and emotional distress.

He sustained damage to his car. Both plaintiffs testified they have lost respect for the police. Their senior year in high school was disrupted by the incident. There is evidence that plaintiffs are likely to bear some emotional scars from this experience for the remainder of their lives.

4) Although Officer Allen was technically off duty at the time of the incident, an off duty Memphis policeman is authorized to be armed. He is required to act if he observes the commission of a crime. The Court therefore finds that Officer Allen's use of his Memphis Police identification card and police service revolver were acts done under color of state law.

5) Officer Allen's reputation for displaying maladaptive behavior was well known among Police officers in his precinct. When informed of the incident

involving plaintiffs, the following statements were made by Officer Allen's colleagues:

They finally caught up with him; he's a quack; Allen has done something this time that he can't get out of.

Allen's reputation as a "mental case" was widespread among the officers. Because none of the officers wished to ride in the same squad car with Officer Allen, he was frequently relegated to ride by himself. He was known to have bragged about killing a man in the course of duty. Officer Allen has often stated to other officers that he wished he knew the exact bullet spread in the chest of the man he killed. Officer Allen referred to a pair of gloves in his possession as "killing gloves," and he would ceremoniously put those gloves on his hands when he was called to the scene of a crime.

6) At least on one prior occasion, an officer reported Officer Allen's morbid conduct to a supervisor. Officer Joe Davis made that report to Captain D. A. Moore and requested that he be assigned to ride with someone other than Officer Allen. As long as Captain Moore was at Mr. Davis' precinct, this request was honored for the most part.

7) At least two formal complaints were filed with the Memphis Police Department by citizens against Officer Allen prior to the incident involving plaintiffs. Kathleen Myrick had filed a complaint alleging "conduct unbecoming of an officer." Jeanne DeBlock testified that Officer Allen had stopped her on the interstate highway, ordered her into his squad car and taunted her for about an hour and a half. During that time he ordered her to repeat her story to him

at least four times. When he released her, she called him a name, and he threw her back into his squad car, taunted her for at least another hour, took her to jail for the night and impounded her car. Although she had presented a valid driver's license when asked, Officer Allen charged her with driving without a license and speeding. Officer Allen was given an oral reprimand based upon Ms. Myrick's complaint. No action was taken against him for Ms. DeBlock's complaint. Upon his departure from the Memphis Police Department in March of 1977, twenty complaints against Officer Allen were part of his police file records. Those included complaints for serious abuse of police authority and use of unnecessary force. Officer Allen had received commendations while a police officer. He was subsequently convicted and imprisoned for his

role in the incident involving plaintiffs.

8) Defendant Chapman has been Police Director since his appointment in September, 1976. Prior to his Administration, there was no direct involvement of the Police Director with matters of officer misconduct. Mr. Chapman devised procedures which provided for his personal involvement with matters of misconduct. Those procedures were not implemented until early in the year of 1977. The old procedure was followed until Director Chapman's new procedures were adopted and implemented. The new procedures operated prospectively. Thus, Mr. Chapman was not apprised of Officer Allen's disciplinary record, since he had failed to review the existing records of police officers relating to misconduct.

9) Even under the new procedures implemented by Mr. Chapman, Officer Allen

would not have been dismissed from the Memphis Police Department based upon his police disciplinary record at the time of the incident involving plaintiffs. The new procedures failed to encourage or impose any duty on officers to file formal complaints on their own initiative against other officers when warranted. Mr. Chapman's plan also failed to impose a duty on supervisors to take action to seek out and discover officers who might have dangerous propensities. Even under the new procedures, immediate supervisors of the officers were insulated from knowledge of officer misconduct. In the absence of the filing of formal complaints by either citizens or officers, Mr. Chapman was almost always uninformed of police officer misconduct. No direct action was taken by the Police Director to seek out incidents of officer misconduct

from immediate supervisors.

10) Mr. Chapman had no personal knowledge of Officer Allen's dangerous propensities nor did many of the other supervisors within the hierarchy of the police department.

11) Serious limitations hindered the police department and its Director from disciplining errant officers. Those factors included a code of silence among the officers, restrictive provisions within the union contract, and review of police disciplinary actions by a Civil Service Review Board. In a previous case, Mr. Chapman testified that he fired an officer charged with pistol-whipping a citizen and dismissed another officer charged with breaking the limbs of a prisoner. In both cases the Civil Service Review Board reinstated the officers. Because of those constraints, Mr. Chapman believed that it

was better to take no disciplinary action against an officer than to take action and be reversed by the Civil Service Review Board.

12) Standard form letters were routinely sent to citizens in response to their formal complaints. Those letters were signed by Mr. Chapman and assured complainants that the matter in question had been properly acted upon by the Police Department. Such letters were sent to Ms. Myrick and Ms. DeBlock in response to prior complaints made against Officer Allen.

CONCLUSIONS OF LAW

Plaintiffs have filed an action for damages for assault and battery and declaratory relief arising under 42 U.S.C. §§ 1983, 1988, and the Fourteenth Amendment to the Constitution of the United States. Plaintiffs seek to redress the deprivation

of rights, under color of Tennessee law, secured to them by said statutory and constitutional provisions. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

Defendants in this case are Robert J. Allen, a former police officer who was off duty at the time of the incident in question, and the Honorable E Winslow Chapman, Director of the Memphis Police Department. Because Mr. Allen failed to answer the complaint, a default judgment was entered against him.

Mr. Chapman was sued in his official capacity as an agent of the Memphis Police Department. According to Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690 n.55, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611, 635 (1978): "official-capacity suits generally represent only another way of pleading an action

against an entity of which an officer is an agent.... [O]ur holding ... decides that local government officials sued in their official capacities are 'persons' under § 1983...."

Title 42, section 1983, United States Code provides in part as follows:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In Taylor v. Grindstaff, 467 F.Supp. 4, 5 (E.D. Tenn. 1978), the Court stated the following:

Two elements are requisite for recovery under the Federal Civil Rights Act, i.e., conduct under color of state law by the person(s) whose conduct is complained of, and the

subjection of the plaintiff by such conduct to the deprivation of rights, privileges and immunities secured to him by the federal Constitution and laws. Basista v. Weir, 340 F.2d 74, 79 (3rd Cir. 1965).

For one to be liable under this provision, he must act under "color of law," and in doing so he must play an "affirmative part" in the deprivation of the constitutional rights of another. See Rizzso v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). According to Henig v. Odorioso, 385 F.2d 491, 494 (3rd Cir. 1967):

[M]isuse of power, possessed by virtue of state laws and made possible only because the wrongdoer is clothed with the authority of state law [is action taken under color of law]. See U.S. v. Classic, 313 U.S. 299 at 316 [61 S.Ct. 1031, 1043, 85 L.Ed. 1368] (1940).

Furthermore, the United States Supreme Court in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961), stated the following:

There can be no doubt ... that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.

Mr. Chapman could not be held liable under any theory for the actions of the off duty officer Allen, as long as Officer Allen had failed to act under "color of law." However, when Officer Allen displayed his official police identification and used his police revolver, he acted under "color of law."

It has been held that a Police Chief played an "affirmative part" in the deprivation of constitutional rights "if [he] deployed or hired an officer under conditions which he should have known would create a threat to the constitutional rights of the citizenry" Kostka v. Hogg, 560 F.2d 37, 40 (1st Cir. 1977).

However, such a federal official is under no duty to anticipate unforeseeable constitutional developments. Mitchell v. King, 537 F.2d 385, 389 (10th Cir. 1976). Moreover, in the case of Rizzo v. Goode, supra, a class action suit where only equitable relief was sought, the Supreme Court held that the Federal District Court exceeded its authority when it required defendant to adopt a revised program to govern the manner by which complaints against officers would be handled.

Both parties to this case have agreed that Mr. Chapman had no actual knowledge of Officer Allen's dangerous propensities. Thus, the sole issue is whether Director Chapman should have known that Officer Allen's dangerous propensities created a threat to the rights and safety of other citizens. Because Mr. Chapman, as Police Director, should have

known of Officer Allen's dangerous propensities the Court finds that he must be held liable, in his official capacity, to the plaintiffs.

Police officers are vested by law with great responsibility. As a result, they must be held to high standards of official conduct. In the absence of high standards of official conduct, the likelihood of abuse of police authority and deprivation of citizens' civil rights is very great. Officials of the Police Department must become informed of the presence in the Department of officers who pose a threat of danger to the safety of the community. Likewise, when knowledge of a particular officer's dangerous propensities is widespread among the ranks of police officers, the Police Department's officials must understand that a threat to the safety of the community exists.

In this case, Mr. Chapman failed to take proper action to become informed of Officer Allen's dangerous propensities. For example, upon his appointment as Police Director, Mr. Chapman failed to review the disciplinary records of officers prior to the incident involving the plaintiffs. Even if he had done so, it is doubtful that Mr. Chapman would have been apprised of Officer Allen's dangerous propensities under departmental procedures then instituted by Mr. Chapman. This is because only if a formal complaint were filed by either a policeman or a citizen would the Police Director ever be informed of an officer's dangerous propensities or of police misconduct.

Due to a code of silence induced by peer pressure among the rank-and-file officers and among some police supervisors, few -- if any -- formal complaints were

ever filed by police personnel. Furthermore, when complaints were filed by citizens, little disciplinary action was apparently taken against the offending officer. Instead, a standard form letter, bearing Mr. Chapman's signature, was mailed to each complainant, assuring the person that appropriate action had been taken by the Police Department, even if such action had not in fact been taken. This tended to discourage follow-up measures by the complaining citizen. Perhaps, Mr. Chapman's belief that it was better to take no disciplinary action than to act and later be reversed by a review board was responsible for this obviously inadequate solution. The end result was twofold: 1) Mr. Chapman's procedures were highly conducive to "covering up" officer misconduct; 2) the Police Director and many of his supervisors were totally

insulated from knowledge of wrongdoing by officers as a result of policies in effect during that period of Mr. Chapman's relatively new administration. In other words, due to the inherently deficient nature of police administrative procedures involving the discovery of officer misconduct, Mr. Chapman seldom knew of misconduct matters which he should have known, such as Officer Allen's dangerous propensities.

Officer Allen's reputation for maladaptive behavior was widespread at the officers of the precinct. Furthermore, the least one of the officers personally informed one of the chief precinct supervisors of Mr. Allen's morbid tendencies. Nevertheless, investigation and action by this supervisor were not undertaken as a result of those procedures then in effect during this period of Mr. Chapman's directorship. Under these circumstances, it

would require feats of mental gymnastics to believe that Mr. Allen's immediate supervisors were not aware of the dangerous situation created by Officer Allen's presence on the Memphis police force. Still, there was apparently no communication between Mr. Chapman and those supervisors regarding Officer Allen's dangerous propensities.

Mr. Chapman has, in effect, asked the Court to find as acceptable unjustified inaction. This the Court cannot do. The evidence does not permit the Court to do so. The plaintiffs in this case were seriously frightened and injured by Officer Allen. The attack upon them was wilful, wanton, unprovoked and brutal. Because he should have known of Officer Allen's dangerous propensities considering the totality of all of the circumstances of this case and because he should have

taken steps to dismiss Officer Allen from the police force, Director Chapman's unjustified inaction was the cause of plaintiffs' damage and injuries. Accordingly, Mr. Chapman in his capacity as Director of the Memphis Police Department must be held liable to plaintiffs in this case.

The disposition of this case, upon all of the evidence presented at the hearing, does not blind the Court to the fine record of Mr. Chapman. Neither is the Court unaware that the Memphis Police Department is staffed by very fine men and women. This Court can note with satisfaction the progress made by that Department under the progressive Directorship of Mr. Chapman. In this case, the Court is dealing with evidence pertaining to only one obviously dangerous police officer, former Officer Allen. The over-

whelming evidence, and not just a preponderance of the evidence, shows that it was a real and present danger to the City of Memphis and its citizens for Officer Allen to have been on the Memphis Police Department at the time this terrible incident occurred. His dangerous propensities were widely known among officers of the Department. Officer Allen inflicted severe and painful injuries upon two innocent young people. Considering all the facts, Mr. Chapman, though relatively new in his job at the time, should have known of Allen's dangerous propensities.

It is therefore by the Court

ORDERED that the defendants be held liable in damages to the plaintiffs. The Court will, after a period of 30 days from the date of this order, refer the case to a United States Magistrate for a prompt hearing on the issue of damages and for a

recommendation to the Court on the amount of damages that should be awarded plaintiffs. If this matter of damages can be resolved by the parties to this action within 30 days then no hearing by a Magistrate will be necessary. The parties can simply present an appropriate order to the Court.

Nos. 82-5321
82-5346

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|------------------------------|---|------------------|
| ELIZABETH A. BRANDON AND | : | |
| JAMES D. MUSE, | : | |
| | : | |
| <u>Plaintiffs-Appellees,</u> | : | |
| <u>Cross-Appellants.</u> | : | On Appeal from |
| | : | the United |
| v. | : | States District |
| | : | Court for the |
| ROBERT J. ALLEN, | : | Western District |
| | : | of Tennessee. |
| <u>Defendant-Cross-</u> | : | |
| <u>Appellee,</u> | : | |
| | : | |
| E. WINSLOW CHAPMAN, | : | |
| | : | |
| <u>Defendant-Appellant,</u> | : | |
| <u>Cross-Appellee.</u> | : | |

Decided and Filed October 11, 1983

Before: LIVELY, Chief Circuit
Judge; MERRITT, Circuit Judge; PECK,
Senior Circuit Judge.

MERRIT, Circuit Judge. Plaintiffs, Elizabeth A. Brandon and James S. Muse, commenced this action in the District Court for the Western District of Tennessee to recover damages and declaratory relief under 42 U.S.C. §1983 and the Fourteenth Amendment. Their complaint arises from an assault and battery committed against them by ex-police officer defendant Robert J. Allen. Plaintiffs also sue E. Winslow Chapman, Director of the Memphis Police Department, in his official capacity for his failure to prevent the assault. The case presents questions concerning the standard of liability of supervisory police officials and the measure of damages against police officers who deliberately and without provocation assault citizens under color of law.

I. Facts

The plaintiffs, who were high school seniors at the time, were parked in a secluded spot at 11:30 p.m. on March 5, 1977. Officer Allen was then employed by the Memphis Police Department but was off duty. The officer approached the parked car, showed his police identification card, and ordered the young man to get out of the car. When Muse obeyed the order, Officer Allen maliciously and without provocation struck Mr. Muse in the head and neck and then stabbed him with a knife. Muse managed to get back into the car and drive off despite Officer Allen's efforts to get into the car. As Muse pulled away, Officer Allen fired his gun at the car shattering the windshield and causing facial injuries to Ms. Brandon. The young couple went immediately to the hospital with Officer Allen in pursuit.

Allen was subsequently tried in criminal court and convicted of assault with intent to murder.

The plaintiffs received a default judgment in the District Court against defendant Allen. The District Court also found Director Chapman liable in his official capacity for the injuries suffered by the plaintiffs. The cause was referred to the United States Magistrate for a recommendation on the amount of damages to be awarded. The Magistrate recommended and the District Court agreed that Mr. Muse should receive \$21,210.75 in compensatory damages and out-of-pocket expenses, that Ms. Brandon was entitled to \$5,000 in compensatory damages, and that each should get \$25,000 in punitive damages. The compensatory and out-of-pocket damage awards were made against defendants Chapman and Allen jointly and severally

while the punitive damages were assessed only against Allen.

The plaintiffs challenge the award of damages because the compensatory damages were not measured to take into account the deprivation of their constitutional rights by the police officer. Defendant Chapman, cross-appealing, challenges the findings of liability against him primarily by attacking the standard utilized by the District Court. Defendant Allen has neither appealed nor participated in this appeal.

We hold that the District Court erred by finding Director Chapman liable for the attack perpetrated by Officer Allen. Therefore, we need not reach the damage question as it pertains to Director Chapman. Compensatory damages were awarded against both defendants jointly and severally, however, so the plaintiffs'

challenge to the compensatory award must be addressed with regard to the absent defendant, Robert J. Allen. Because we believe that the Magistrate and the District Court erred in refusing to allow the full measure of compensatory damages under applicable law, we reverse and remand that portion of the District Court's judgment which establishes plaintiffs' damages.

II. Liability of Police Director Chapman

In Parratt v. Taylor, 451 U.S. 527 (1981) the Supreme Court recently clarified the standard of liability under § 1983 against supervisory officials in the law enforcement and corrections field. The Court listed the following two essential elements which must be present as a threshold consideration to support a § 1983 action: (1) the perpetrator must have acted under color of state law and (2) the

conduct must have deprived the complainant of rights, privileges, or immunities secured by the Constitution or laws of the United States. 451 U.S. at 535. The Court specifically declined to adopt a standard requiring more than simple negligence. It concluded that "nothing in . . . § 1983 . . . limits the statute solely to intentional deprivations" or denies liability to a "wrong . . . negligently as opposed to intentionally committed." Id. at 534.

Although the Parratt Court set a comparatively low threshold standard for showing a § 1983 deprivation in cases against supervisory officials, the Court did not disturb its holdings in previous cases which extend to governmental officials a qualified immunity defense based on good faith. The Court referred with approval to its decision in Procunier v.

Navarette, 434 U.S. 555 (1978), which held that state prison officials were entitled to qualified immunity in suits under § 1983. In other words, governmental officials are immune from liability under § 1983 unless they "knew or reasonably should have known" that their actions would cause a constitutional or statutory deprivation. Id. at 562.

The parties in this case expend considerable energy either relying on or distinguishing our opinion in Hays v. Jefferson County, 668 F.2d 869 (6th Cir. 1982), which was decided without the benefit of Parratt, supra. In Hays, the plaintiffs sued various high level police officials under § 1983 to redress injuries suffered at the hands of street level officers during an anti-busing demonstration. We held that simple negligence was insufficient to support a § 1983 claim.

The governmental authority must be shown some other way directly participated in the misconduct. Hays, supra, at 874.

Defendant Chapman argues in his brief that he should not be held liable because of this higher standard set out in Hays. The Supreme Court in Parratt clearly rejected this higher threshold standard. Liability based on negligence is sufficient, and the Parratt case undermines our decision in Hays. We need not decide, however, whether the District Court correctly found that Director Chapman was guilty of simple negligence by failing to prevent the assault on the plaintiffs. We need not reach this question because Director Chapman is protected by the qualified immunity.

In Procunier, supra, the Supreme Court reaffirmed that governmental officers have immunity if they acted in good faith:

It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 562 (quoting Scheuer v. Rhodes, 416 U.S. 232 (1974)).

Director Chapman acted in good faith and is accordingly entitled to immunity. The record is clear that he knew nothing whatsoever about Officer Allen -- including Allen's instability. Director Chapman assumed his office six months prior to the incident with the plaintiffs. He was in the process of instituting significant changes to stop police brutality in Memphis. He played no personal role in the actual incident; he executed his supervisory functions in good faith and with diligence in order to prevent just this type of citizen abuse.

We can find no indication in the record that he acted with anything other than good faith during his short tenure in office prior to the incident.

The plaintiffs' argument that the qualified immunity is inapplicable simply because they sued Chapman in his official capacity is unavailing. Under Owen v. City of Independence, 445 U.S. 622 (1980), a municipality is not entitled to claim the qualified immunity that the city's agents can assert. But this is a suit against an individual, not the city. In reality, plaintiffs are attempting to amend their complaint so as to treat the Police Director as though he were the City in order to avoid the qualified immunity which shields Director Chapman. Such an argument is without support in precedent or reason.

III. The Damages Issue

In his Report and Recommendations on damages, the Magistrate refused to allow plaintiffs' damage award against Allen to reflect the fact that the injury to their dignity, the insult to their person was greater because the assault was carried out by a police officer acting under color of law. The Magistrate based this decision on Carey v. Piphus, 435 U.S. 247 (1978), which holds that a successful plaintiff in a procedural due process § 1983 action is entitled to recover only nominal damages in the absence of proof of actual injury. The Court observed that although the law recognizes the importance to organized society that certain "absolute rights" be protected, "substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish

malicious deprivation of rights." Id. at 266. Citing the Piphus Court's emphasis on actual injury and the compensation principle, the Magistrate and the District Court appear to have concluded that damages may only include actual or special damages for the physical injury involved and may not reflect injury to the dignity of the person which arises when a police officer under color of law assaults a citizen.

We believe that the Magistrate erred in refusing to consider fully the nature of the wrong in measuring damages. In addition to providing compensation for plaintiffs who incur tangible physical or economic injury, the common law for centuries has permitted recovery for invasions of a wide array of intangible "dignitary interests;" in such cases, injury is presumed. See D. Dobbs, Law of

Remedies § 7.3, at 528 (1973). The Piphus case has not disturbed this principle as it pertains to constitutional tort actions in general. On the contrary, the Supreme Court stressed that common law rules "defining the elements of damages and prerequisites for their recovery provide the appropriate starting point for the inquiry under § 1983 as well." Carey v. Piphus, supra, 435 U.S. at 257-58. Moreover, the Court explicitly limited its decision in Piphus by noting that "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." Id. at 264-65.

Unlike Piphus, the instant assault and battery case entails actions by a

Memphis police officer which clearly violated plaintiffs' substantive rights to enjoy the security of life and limb. At common law, general as distinguished from special damages were allowed. See D. Dobbs, supra, at 528. In such cases, two other circuit courts have held that § 1983 plaintiffs may recover substantial general money damages as compensation for the wrong. See Corriz v. Naranjo, 667 F.2d 892, 897-98 (10th Cir. 1981), cert. dismissed, 103 S.Ct. 2 (1982); Herrera v. Valentine, 653 F.2d 1220, 1227-31 (8th Cir. 1981). We agree with the Tenth and Eighth Circuits that there is a qualitative and quantitative difference between injury suffered as a result of a wrong for which the common law did not allow general damages and an injury resulting from an intentional battery by a police officer. This common law distinction must continue

to play a role in the awarding of compensatory damages in § 1983 actions. See D. Dobbs, supra, at 531 (1973).

We, therefore, reverse the District Court's judgment regarding compensatory damages and remand the case so that the nature of the wrong may be considered in computing plaintiffs' compensatory damage award. Because of our holding in Part I of this opinion that defendant Chapman is immune to this suit, the remand regarding damages pertains only to defendant Allen.

Accordingly, the decision of the District Court is reversed and the case remanded for further proceedings consistent with this opinion.

Nos. 82-5321
82-5346

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|------------------------------|---|---------------|
| ELIZABETH A. BRANDON AND | : | |
| JAMES D. MUSE, | : | |
| | : | |
| <u>Plaintiffs-Appellees,</u> | : | |
| <u>Cross-Appellants.</u> | : | ORDER DENYING |
| | : | PETITION FOR |
| | : | REHEARING |
| ROBERT J. ALLEN, | : | EN BANC |
| | : | |
| <u>Defendant</u> | : | |
| | : | |
| v. | : | |
| | : | |
| E. WINSLOW CHAPMAN, | : | |
| in his official capacity | : | |
| as Director of Police | : | |
| for the City of Memphis, | : | |
| | : | |
| <u>Defendant-Appellant,</u> | : | |
| <u>Cross-Appellee</u> | : | |

Before: LIVELY, Chief Judge; MERRITT,
Circuit Judge; PECK, Senior Circuit
Judge.

In a long and eloquent petition for en banc reconsideration, the plaintiffs take the Court to task for granting a qualified good faith privilege to the Memphis Director of Police sued for damages in his official capacity. No judge of the Court having requested an en banc vote, the petition has been referred to the original panel for disposotion. On this issue, the panel adheres to its original view. We do not believe that a judgment for damages against a police official in his official capacity is the same as a judgment against the city itself or that the legal principles respecting official privileges and immunities are the same. Although some cases may treat the person and the governmental entity in a similar fashion for some purposes, we find no case which holds or suggests that the

two should be treated the same for this purpose.

Accordingly, the petition for reconsideration is denied.

ENTERED BY ORDER OF THE COURT

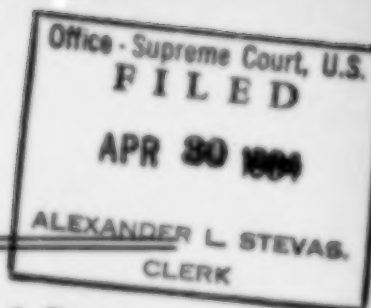
/s/ John P. Helman
Clerk

* this order was prepared by Judge Merritt.

RESPONDENT'S BRIEF

(2)

No. 83-1622



In the Supreme Court of the United States

October Term, 1983

ELIZABETH BRANDON, et al.,
Petitioners,

VS.

JOHN D. HOLT, etc., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

HENRY L. KLEIN (Counsel of Record)
1500 First Tennessee Building
Memphis, Tennessee 38103
(901) 523-2363

CLIFFORD D. PIERCE, JR.
City Attorney
Room 314
125 North Mid-America Mall
Memphis, Tennessee 38103
(901) 528-2614
Attorneys for Respondents

QUESTION PRESENTED

1. Was the Court of Appeals correct in holding that a police supervisory official was entitled to a qualified immunity defense based upon good faith?

TABLE OF CONTENTS

| | |
|--|----|
| Question Presented | I |
| Table of Authorities | II |
| Opinions Below | 1 |
| Statement of the Case | 2 |
| Statement of Facts | 3 |
| Reasons for Denying Review | 4 |
| I. The Court of Appeals Correctly Held That a Police Supervisory Official Was Entitled to a Qualified Immunity Defense | 4 |
| II. The Decision of the Court of Appeals Does Not Create a Conflict Among the Circuits | 7 |
| Conclusion | 7 |

TABLE OF AUTHORITIES

Cases:

| | |
|---|------|
| <i>Brandon v. Allen</i> , 719 F.2d 151 (6th Cir. 1983) | 1 |
| <i>Brandon v. Allen</i> , 516 F. Supp. 1355 (W.D. Tenn. 1981) | 1 |
| <i>Family Unidas v. Briscoe</i> , 619 F.2d 391 (5th Cir. 1980) | 5 |
| <i>Hughes v. Blankenship</i> , 672 F.2d 403 (4th Cir. 1982) | 5, 7 |
| <i>Key v. Rutherford</i> , 645 F.2d 880 (10th Cir. 1981) | 5 |
| <i>Monell v. Department of Social Services</i> , 436 U.S. 658 (1978) | 6 |
| <i>Owen v. City of Independence</i> , 445 U.S. 622 (1980) | 6 |
| <i>Procunier v. Navarette</i> , 434 U.S. 555 (1978) | 7 |
| <i>Van Ooteghem v. Gray</i> , 628 F.2d 488 (5th Cir. 1980) | 5 |
| <i>Wood v. Strickland</i> , 420 U.S. 308 (1975) | 7 |

Constitutional and Statutory Authorities:

| | |
|------------------------------------|---|
| U.S. Constitution amend. XIV | 2 |
| 42 U.S.C. § 1983 | 2 |
| 42 U.S.C. § 1988 | 2 |

No. 83-1622

In the Supreme Court of the United States

October Term, 1983

ELIZABETH BRANDON, et al.,
Petitioners,

vs.

JOHN D. HOLT, etc., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

Respondent John D. Holt (E. Winslow Chapman) respectfully submits that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, is reported as *Brandon v. Allen*, 719 F.2d 151 (6th Cir. 1983). Order Denying Petition for Rehearing en Banc which is not reported was filed December 2, 1983. The Findings of Fact, Conclusions of Law, and Order of the District Court are reported at 516 F. Supp. 1355 (W.D. Tenn. 1981).*

*Citations to the opinions below are to the appendix to the petition for a writ of certiorari and are designated as A. Citations to the record below are to the Joint Appendix in the Sixth Circuit and are designated as App.

STATEMENT OF THE CASE

This action was commenced on February 22, 1978 by plaintiffs Elizabeth A. Brandon and James S. Muse seeking damages for assault and battery and declaratory relief arising under 42 U.S.C. §§ 1983, 1988 and the Fourteenth Amendment of the Constitution. Complaint ¶ 1; App. 6. Named as defendants were Wyeth Chandler, Mayor of Memphis, Tennessee, E. Winslow Chapman, Director of Police and Robert J. Allen, an employee of the Memphis Police Department. Complaint ¶'s 4, 5, 6; App. 7. The Complaint alleges that defendants Chapman and Chandler knew or should have known that Officer Robert J. Allen was not a good and proper person to be entrusted with the authority and responsibility of a police officer. Complaint ¶ 26; App. 10, 11. The Complaint further alleges that defendants Chapman and Chandler acted in a reckless, willful and wanton manner by their continued employment of defendant Allen and under color of state law deprived plaintiffs of due process of law. Complaint ¶ 27; App. 11.

On July 13, 1978, pursuant to a Motion for Summary Judgment filed by defendants Chandler and Chapman an Order was entered granting Summary Judgment for defendant Chandler. Because there was some question whether defendant Chapman knew of any dangerous propensities of Allen, his motion was denied. App. 28-30.

Due to his failure to appear and answer the charges in the Complaint, a default judgment was entered against defendant Robert J. Allen. App. 13.

The case went to trial against defendant Chapman, without intervention of jury. The sole issue before the Court was whether Chapman, as Director of Police should

have known that Officer Allen's dangerous propensities created a threat to the rights and safety of citizens. A. 20a. Following the trial, the case was taken under advisement and on July 8, 1981 the Court entered an Order finding that Chapman was liable because he failed to take proper action to become informed about Officer Allen and to act accordingly. A. 22a, 26a. The Court went on to comment on the fine men and women who staff the Memphis Police Department and the progress made by the Department under the "progressive Directorship" of Chapman. A. 26a.

A Judgment was entered against both Chapman and Allen. App. 24. Thereafter the Court referred the case to the Magistrate for a determination of damages. The Magistrate filed a Report and Recommendation. App. 70-77. Exceptions were filed by plaintiffs and defendant Chapman. App. 78-80. On May 4, 1982, the District Judge entered an Order Approving and Adopting the Report and Recommendation of the Magistrate. App. 92, 92A.

Both plaintiffs and defendant Chapman appealed, App. 25, 26. The Court of Appeals, Judges Lively, Merritt and Peck reversed holding that the District Court erred by finding Director Chapman liable for the acts of Officer Allen. A. 33a. The Court found that Chapman acted in good faith and was entitled to immunity. A. 38a. Petition for Rehearing en Banc was denied. A. 45a-47a.

STATEMENT OF FACTS

Respondent adopts the statement of facts set out in the opinion of the United States Court of Appeals Decided and Filed October 11, 1983. A. 31a-33a.

REASONS FOR DENYING REVIEW

I. The Court of Appeals Correctly Held That a Police Supervisory Official Was Entitled to a Qualified Immunity Defense.

The original action in this cause named as defendants, Robert J. Allen, a patrolman with the City of Memphis; Wyeth Chandler, Mayor of Memphis; and E. Winslow Chapman, Director of Police. App. 6. For whatever reason, the City of Memphis was not named. The Complaint does not state specifically whether Chandler and Chapman are being sued in their individual capacity or official capacity or both. The alleged basis for the liability of Chandler and Chapman is that they "knew or should have known that Robert J. Allen was not a good and proper person to be entrusted with authority, power and responsibility of a police officer" and "that by their continued employment of Officer Robert J. Allen acted in a manner which was reckless, willful and wanton against the plaintiffs" and "by this continued employment of Officer Robert J. Allen, defendants Chandler and Chapman have intentionally and under color of state law deprived the plaintiffs of due process of law". Complaint ¶s 25, 26; App. 10, 11. These are simple allegations of negligent retention involving a single incident. There is no allegation that the acts of Chandler and Chapman represent the official policy of the Memphis Police Department or the City. Mayor Chandler was granted a Summary Judgment. The Court concluded that he was not present at the scene of the alleged incident; he had no knowledge of the incident until after it occurred; did not know, nor had ever heard of Allen; had no prior knowledge of Allen's characteristics which might make him unfit for service as a police officer; and

had no information that would indicate that Allen should be discharged. App. 29. A similar Motion for Summary Judgment was filed by Chapman; however, it was denied because the Court felt that there may be a genuine issue of fact as to whether Chapman was aware of some departmental investigations into prior complaints involving Allen. App. 30. Again it is clear that the Court is dealing with a negligence issue. This is further emphasized in the Findings of Fact, Conclusions of Law and Order of the District Court in which it determined that "the sole issue is whether Director Chapman *should have known* that Officer Allen's dangerous propensities created a threat to the rights and safety of citizens". A. 20a.

The Trial Court found that Director Chapman should have known of Allen's dangerous propensities and found him liable in his "official capacity". A. 21a. The District Judge never dealt with the question of qualified immunity based upon good faith.

The position taken by plaintiffs before the Court of Appeals, was that since this is an action for damages against a party in his official capacity, it is in essence, an action against the governmental entity of which the officer is an agent. *Hughes v. Blankenship*, 672 F.2d 403, 406 (4th Cir. 1982); *Van Ooteghem v. Gray*, 628 F.2d 488, 496 (5th Cir. 1980). In other words, the City of Memphis was liable for the acts of Director Chapman. Furthermore, they contended that since Chapman was acting in his official capacity he was not entitled to qualified immunity. *Family Unidas v. Briscoe*, 619 F.2d 391, 403 (5th Cir. 1980); *Key v. Rutherford*, 645 F.2d 880, 883 n.5 (10th Cir. 1981).

The Court of Appeals disagreed with plaintiffs' reasoning that Chapman was not entitled to a good faith defense. The Court went on to say:

"The plaintiffs' argument that the qualified immunity is inapplicable simply because they sued Chapman in his official capacity is unavailing. Under *Owen v. City of Independence*, 445 U.S. 622 (1980), a municipality is not entitled to claim the qualified immunity that the city's agents can assert. But this is a suit against an individual, not the city. In reality, plaintiffs are attempting to amend their complaint so as to treat the Police Director as though he were the City in order to avoid the qualified immunity which shields Director Chapman. Such an argument is without support in precedent or reason."¹

The findings of the Court of Appeals were correct. Regardless of the label placed upon this set of facts by the Trial Court and plaintiffs, it is nothing more than an action against an individual even though he was acting as an official of the city. This is evident from the way the case was originally filed and the way it was tried. To hold the city liable in this instance would be to find it liable because it is the employer of Director Chapman. It is clear that a municipality is not liable under the theory of respondeat superior for injuries inflicted solely by its agents or employees. Rather "it is when execution of a government's policy or custom whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Neither the pleadings nor the Trial Court's findings suggest that this case involves official policy or custom which resulted in a constitutional violation. Where the injury occurring did not

arise from the execution of governmental policy or custom, the defendant can not be held liable in his official capacity. *Hughes v. Blankenship*, *supra*, at p. 406. Under the circumstances, Director Chapman was entitled to immunity based upon good faith. *Procunier v. Navarette*, 434 U.S. 555 (1978); *Wood v. Strickland*, 420 U.S. 308 (1975).

II. The Decision of the Court of Appeals Does Not Create a Conflict Among the Circuits.

The Court of Appeals' opinion in this case is not in conflict with the other circuits. As the Court said "... this is a suit against an individual, not the city". A. 39a. No official policy or custom is involved. There is no real inconsistency in the decision of the Sixth Circuit and the decisions of the Fourth, Fifth, Seventh and Tenth Circuits, and for that matter, with the decisions of this Court in *Monell* and *Owen*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY L. KLEIN

Suite 1500

First Tennessee Building

Memphis, Tennessee 38103

(901) 523-2363

1. A. 39a.

AMICUS CURIAE

BRIEF

2
No. 83-1622

Office - Supreme Court, U.S.

FILED

JUL 12 1984

ALEXANDER L. STEVAS

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

ELIZABETH BRANDON, ET AL., PETITIONERS

v.

JOHN D. HOLT, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS
CURIAE SUPPORTING PETITIONERS

REX E. LEE

Solicitor General

RICHARD K. WILLARD

Acting Assistant Attorney General

KENNETH S. GELLER

Deputy Solicitor General

BRUCE N. KUHLIK

Assistant to the Solicitor General

BARBARA L. HERWIG

WENDY M. KEATS

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

BEST AVAILABLE COPY

1702

QUESTION PRESENTED

Whether an action for damages against a public officer in his official capacity may be treated as if it were brought against the officer in his individual capacity.

TABLE OF CONTENTS

| | Page |
|---|------|
| Interest of the United States | 1 |
| Statement | 2 |
| Summary of argument | 2 |
| Argument: | |
| A suit for damages against a public officer in his official capacity may not be treated as a suit against the officer in his individual capacity | 4 |
| Conclusion | 10 |

TABLE OF AUTHORITIES

Cases:

| | |
|---|------|
| <i>Barr v. Matteo</i> , 360 U.S. 564 | 7, 8 |
| <i>Bivens v. Six Unknown Named Agents</i> , 403 U.S. 388 | 7 |
| <i>Bush v. Lucas</i> , No. 81-469 (June 13, 1983) | 7 |
| <i>Butz v. Economou</i> , 438 U.S. 478 | 8 |
| <i>Cabrera v. Municipality of Bayamon</i> , 622 F.2d 4 | 6 |
| <i>Campbell v. Bowlin</i> , 724 F.2d 484 | 4 |
| <i>Carlson v. Green</i> , 446 U.S. 14 | 7 |
| <i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 | 5 |
| <i>Conley v. Gibson</i> , 355 U.S. 41 | 9 |
| <i>Edelman v. Jordan</i> , 415 U.S. 651 | 4 |

IV

Page

Cases—Continued:

| | |
|---|------|
| <i>Falkowski v. EEOC</i> , 719 F.2d 470, petition for cert. pending <i>sub nom.</i> <i>United States Department of Justice v.</i> <i>Falkowski</i> , No. 83-2034 | 8 |
| <i>Familias Unidas v. Briscoe</i> , 619 F.2d 391 | 5 |
| <i>Gomez v. Toledo</i> , 446 U.S. 635 | 7 |
| <i>Harlow v. Fitzgerald</i> , 457 U.S. 800 | 7 |
| <i>Hughes v. Blankenship</i> , 672 F.2d 403 | 4 |
| <i>Hutto v. Finney</i> , 437 U.S. 678 | 4 |
| <i>Jackson v. Hayakawa</i> , 682 F.2d 1344 | 7 |
| <i>Key v. Rutherford</i> , 645 F.2d 880 | 4 |
| <i>Kincaid v. Rusk</i> , 670 F.2d 737 | 4 |
| <i>Land v. Dollar</i> , 330 U.S. 731 | 9 |
| <i>Monell v. New York City Department of</i> <i>Social Services</i> , 436 U.S. 658 | 4, 5 |
| <i>Owen v. City of Independence</i> , 445 U.S. 622 | 2 |
| <i>Pennhurst State School & Hospital v.</i> <i>Halderman</i> , No. 81-2101 (Jan. 23, 1984) | 4 |
| <i>Scheuer v. Rhodes</i> , 416 U.S. 232 | 2, 4 |
| <i>Spomer v. Littleton</i> , 414 U.S. 514 | 5 |
| <i>Stafford v. Briggs</i> , 444 U.S. 527 | 7 |
| <i>Snyder v. Buck</i> , 340 U.S. 15 | 4, 9 |
| <i>United States v. Mendoza</i> , No. 82-849 (Jan. 10, 1984) | 9 |

V

Page

Cases—Continued:

| | |
|---|---|
| <i>United States v. Testan</i> , 424 U.S. 392 | 6 |
| <i>Wolf-Lillie v. Sonquist</i> , 699 F.2d 864 | 4 |
| <i>Young, Ex parte</i> , 209 U.S. 123 | 4 |

Constitution, statutes, regulation and rules:

| | |
|---|---------------|
| U.S. Const. Amend. XI | 4 |
| Equal Access to Justice Act, 28 U.S.C. 2412(d) | 8 |
| 42 U.S.C. (& Supp. V) 1983 | 2, 3, 4, 5, 6 |
| 28 C.F.R. : | |
| Section 50.15 | 8 |
| Section 50.16 | 8 |
| Sup. Ct. R. 40.3 | 5 |
| Fed. R. App. P. 43(c)(1) | 5 |
| Fed. R. Civ. P. : | |
| Rule 4(d)(1) | 7 |
| Rule 4(d)(4)-(6) | 7 |
| Rule 25 advisory Committee note | 6 |
| Rule 25(d)(1) | 5, 6, 7 |

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1622

ELIZABETH BRANDON, ET AL., PETITIONERS

v.

JOHN D. HOLT, ETC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS
CURIAE SUPPORTING PETITIONERS**

INTEREST OF THE UNITED STATES

This case involves the distinction between a suit seeking damages against a government officer in his individual capacity and one seeking damages against an officer in his official capacity. The decision of the court of appeals — treating as an individual-capacity suit a lawsuit characterized by the parties and the district court as an official-capacity action — invites confusion not only in cases brought against officers of municipalities, but in those brought against federal officers as well. Proper defense of actions involving federal officers requires that, from the outset of litigation, claims made against an officer in his individual capacity be clearly differentiated from those made against him in his official capacity. Because of the large volume of litigation brought annually against federal

officers, the United States has a substantial interest in ensuring that individual-capacity and official-capacity actions are appropriately distinguished.

STATEMENT

Petitioners sued the director of the Memphis police department for damages under 42 U.S.C. (& Supp. V) 1983 in the United States District Court for the Western District of Tennessee.¹ The case was described by the district court as an action against the director in his official capacity (Pet. App. 1a, 16a), and indeed was styled as such in the court of appeals (*id.* at 45a). On appeal from a judgment in favor of petitioners, the court of appeals, while recognizing that the director was sued in his official capacity (*id.* at 30a), decided that "this is a suit against an individual, not the city" (*id.* at 39a). Accordingly, the court held that the director was entitled to qualified immunity (see *Scheuer v. Rhodes*, 416 U.S. 232 (1974)), even though the municipality could not have raised such a defense (*Owen v. City of Independence*, 445 U.S. 622 (1980)). Because the court of appeals concluded that the director had acted in good faith (Pet. App. 38a), it reversed the judgment of the district court. In denying petitioners' petition for rehearing, the court explained (*id.* at 46a): "We do not believe that a judgment for damages against a police official in his official capacity is the same as a judgment against the city itself * * *."

SUMMARY OF ARGUMENT

The court of appeals plainly erred in treating, without explanation, an official-capacity action as if it were brought against a public officer in his individual capacity. The law

¹The mayor of Memphis was also sued, but was granted summary judgment (Br. in Opp. 4). Another defendant, a former Memphis police officer, suffered a default judgment from which he did not appeal (Pet. App. 32a-33a). Petitioners sought declaratory relief as well as damages (*id.* at 2a).

has heretofore been clear that an action against an officer in his official capacity is essentially the equivalent of a suit against the government itself and that, considerations of sovereign immunity aside, the judgment in an official-capacity suit binds the governmental entity. The court of appeals neither referred to the substantial body of precedent on this point, nor cited any policy reason for reaching a different result here.

While the impact of the confusion generated by an affirmation of the court of appeals' judgment would fall primarily on local governments because such entities and their officials may both be sued under a single statutory provision (42 U.S.C. (& Supp. V) 1983), the United States would also be adversely affected. The federal government's defense of litigation often depends on whether damages are sought ultimately from the government or from public officers as individuals. For example, requirements relating to service of process and venue vary depending upon the capacity in which the defendant has been sued, and many defenses that are available to individuals may not be raised by the government itself. By the same token, the government may assert defenses, such as sovereign immunity, that are not available to individuals. Moreover, the government's decision whether to settle a lawsuit or appeal an adverse decision must take into account the status of the defendant. Finally, while the United States defends official-capacity suits as a matter of course, we do not automatically provide representation for federal officers sued in their individual capacities.

For these reasons, we request that the Court not only reaffirm the distinction between individual-capacity and official-capacity actions, but also require that plaintiffs state with specificity in their complaints the basis on which the named defendants should be held liable and the form of relief they seek.

ARGUMENT

A SUIT FOR DAMAGES AGAINST A PUBLIC OFFICER IN HIS OFFICIAL CAPACITY MAY NOT BE TREATED AS A SUIT AGAINST THE OFFICER IN HIS INDIVIDUAL CAPACITY

1. The distinctions between suits against public officers in their official capacities and those against officers as individuals are well settled. A suit against a public officer in his official capacity "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent" (*Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 n.55 (1978)).² A judgment for damages in an official-capacity suit accordingly runs against the government, not against the officer individually as it would in a personal-capacity suit. See *Hutto v. Finney*, 437 U.S. 678, 693 (1978); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Snyder v. Buck*, 340 U.S. 15, 31 (1950) (Frankfurter, J., dissenting); *Hughes v. Blankenship*, 672 F.2d 403 (4th Cir. 1982); *Campbell v. Bowlin*, 724 F.2d 484, 489 n.4 (5th Cir. 1984); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 870 (7th Cir. 1983); *Kincaid v. Rusk*, 670 F.2d 737, 742 n.7 (7th Cir. 1982); *Key v. Rutherford*, 645 F.2d 880, 883 n.5 (10th Cir. 1981). Cf. *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974). In actions under 42 U.S.C. (& Supp. V) 1983 this distinction means that a public officer sued in his individual capacity may assert official immunity not available to a municipality, although he may in such a suit be held personally liable without a showing of the type of policy or practice that would be necessary for recovery against the

²Apparently the only instance in which official-capacity actions are not treated as the precise equivalent of suits against the governmental entity is in injunctive actions challenging the constitutionality of the conduct of state officials, which are not considered barred by the Eleventh Amendment under *Ex parte Young*, 209 U.S. 123 (1908). See generally *Pennhurst State School & Hospital v. Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 11-12.

municipality in a suit pleaded as an official-capacity action. See, e.g., *Familias Unidas v. Briscoe*, 619 F.2d 391, 403-404 (5th Cir. 1980).

The court of appeals clearly erred in departing from this well established doctrine.³ Its decision also fails to give effect to the Rules governing official-capacity actions, which provide for the automatic substitution of the successor to a public officer sued in his official capacity who ceases to hold office during the pendency of an action. See Fed. R. Civ. P. 25(d)(1); Fed. R. App. P. 43(c)(1); Sup. Ct. R. 40.3. Such automatic substitution obviously makes sense only where the recovery will not actually be from the named officer. Cf. *Spomer v. Littleton*, 414 U.S. 514 (1974) (injunctive action involving allegations directed at personal policies of state officer may be moot after officer leaves

³There may have been some confusion in the lower courts over the true nature of this action. The complaint was filed in February 1978 (J.A. 1a), shortly before the Court held that local governments could be sued under 42 U.S.C. (& Supp. V) 1983 (*Monell v. New York City Department of Social Services*, *supra*). The district court's conclusion (Pet. App. 27a) that the police director "should have known" of the dangers posed by the continued employment of the patrolman who injured petitioners, and the grant of summary judgment to the mayor (Br. in Opp. 4), suggest that personal liability of the officers may have been contemplated. At trial (Tr. 6), however, counsel for petitioners made it clear in his opening statement that this was an official-capacity suit and, as such, was an action against the municipality. The Report and Recommendations of the Magistrate (J.A. 32a) also indicates that recovery was sought ultimately from the city, because it concludes that no punitive damages would be available against the police director under *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The court of appeals, of course, rested its decision on the premise that official-capacity actions are not equivalent to suits against governmental entities (Pet. App. 39a, 46a), not on an explicit finding that the suit was not properly maintained against the police director in his official capacity.

The merits of petitioners' Section 1983 claim are not before the Court, and we take no position on the issue.

office). Thus, while damages actions against public officers were uncommon when Rule 25(d)(1) was amended to its present form in 1961, the Advisory Committee noted that the Rule was not applicable to "actions which are directed to securing money judgments against the named officers enforceable against their personal assets" (Fed. R. Civ. P. 25(d)(1) advisory committee note). Acceptance of the court of appeals' result here could lead to the anomalous situation of the automatic substitution of a successor-in-office in an official-capacity action, followed by a need for the original defendant's reappearance because a court concludes that the suit is in reality one against the predecessor as an individual.⁴ Cf. *Cabrera v. Municipality of Bayamon*, 622 F.2d 4, 6 (1st Cir. 1980).

2. The confusion generated by any blurring of the distinctions between official-capacity actions and individual-capacity actions would be felt most keenly in suits against municipal officers, because they may be sued personally or as representatives of the government under a single statutory provision, 42 U.S.C. (& Supp. V) 1983. It is nonetheless also important in suits against federal officers to know at the outset of litigation on what basis and from whom relief is sought.

There are obviously many differences, both substantive and procedural, between suits seeking damages from federal officers as individuals and those seeking recovery from the federal government. Substantive differences depend chiefly although not exclusively on the distinctions between official immunity and sovereign immunity. Compare, e.g., *United States v. Testan*, 424 U.S. 392, 399 (1976), with

⁴Indeed, in the instant case the police director originally named as a defendant, E. Winslow Chapman, left office during the pendency of the appeal and was replaced by John D. Holt, the named respondent in this Court (Pet. ii, 10).

Harlow v. Fitzgerald, 457 U.S. 800 (1982), and *Barr v. Matteo*, 360 U.S. 564 (1959); see also *Bush v. Lucas*, No. 81-469 (June 13, 1983); *Carlson v. Green*, 446 U.S. 14 (1980). While a waiver of sovereign immunity must be pleaded by the plaintiff, official immunity is a defense that must be raised by the defendant. *Gomez v. Toledo*, 446 U.S. 635 (1980). The unexpected conversion of an official-capacity suit into an action for damages against a federal officer personally under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), or state tort law could deprive the officer of an opportunity to raise a timely defense of immunity.

Procedural requirements that differ according to whether the suit is brought against an officer in his official or personal capacity may also be determinative of the outcome of litigation. A court may lack jurisdiction over a defendant officer in his personal capacity because of failure to effectuate personal service of process in accordance with Rule 4(d)(1) of the Federal Rules of Civil Procedure, although the officer sued in his official capacity would have been adequately served by registered or certified mail or by service upon a legally designated representative in accordance with Rule 4(d)(4) through (6). See *Jackson v. Hayakawa*, 682 F.2d 1344, 1347-1349 (9th Cir. 1982). The nationwide venue available to plaintiffs in actions against government officers in their official capacities similarly cannot be invoked when a plaintiff seeks to hold the officer liable as an individual. *Stafford v. Briggs*, 444 U.S. 527 (1980). Like the automatic-substitution provision of Rule 25(d)(1), the service and venue provisions applicable to official-capacity damages suits make sense only if such actions are construed as seeking judgments running against the government. Accordingly, if official-capacity actions could be converted into *Bivens* actions after the complaint was filed, defendants might be required to raise jurisdictional and venue

objections that would be irrelevant if such suits were treated, as we argue they should be, as the equivalent of actions against the government.

Finally, the court of appeals' failure properly to distinguish between official-capacity suits and personal-liability suits could lead to the sudden discovery by government counsel in the midst of litigation that he has unknowingly been responsible for representing the interests of individual defendants. This would effectively deprive counsel of the opportunity to determine in a timely fashion whether such representation is in the best interests of both the client and the government, and could precipitate conflicts of interest and deprive individual defendants of adequate representation.⁵ See 28 C.F.R. 50.15, 50.16; *Falkowski v. EEOC*, 719 F.2d 470 (D.C. Cir. 1983), petition for cert. pending *sub nom. United States Department of Justice v. Falkowski*, No. 83-2034.

For these reasons, the distinction between suits seeking recovery against the government and those seeking judgments against individual public officers is an important

⁵For example, government counsel might seek to avoid government liability for an official's wrongful act by asserting that it was committed outside the scope of his official duties, a defense that would be inconsistent with the individual's assertion of immunity. See *Butz v. Economou*, 438 U.S. 478, 489 (1978); *Barr v. Matteo*, 360 U.S. 564, 573-575 (1959). In addition, under the Equal Access to Justice Act, 28 U.S.C. 2412(d), the government may be liable for attorneys' fees if it takes a position in litigation that is not "substantially justified." Positions taken to avoid the potential imposition of attorneys' fees under that standard might not protect individual defendants' interests with sufficient vigor. Finally, some of the factors considered by counsel representing the government in deciding whether to concede an issue, settle a case, or appeal an adverse decision differ from those properly considered by counsel for a private party. See *United States v. Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 6-7.

one.⁶ Any ambiguity in the appropriate classification of official-capacity actions can only lead to great unfairness and substantial uncertainty. This Court should reaffirm the settled principle that actions brought against officers in their official capacity are essentially the equivalent of suits directly against the government. To forestall further confusion, and to aid in the expeditious resolution of suits naming public officers as defendants, it would be appropriate for the Court to indicate that plaintiffs should state with specificity in their complaints the basis on which the named defendants should be held liable and the nature of the relief they seek.⁷ See generally *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (complaint should "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests").

⁶Of course, the language of a particular federal rule or statute, or its policies, may require that a suit against an officer in his individual capacity be treated in the same way as a suit against the government for some specific purpose. But no such exceptional circumstance exists here.

⁷We do not mean to raise a technical pleading requirement that might be used to defeat meritorious claims. Rather, we suggest only that a plaintiff should make his allegations and claim for relief sufficiently precise that a determination of the nature of his action — whether it is in substance against the government or against an individual — might reliably be made at the outset of the case. Cf. *Land v. Dollar*, 330 U.S. 731 (1947); *Snyder v. Buck*, 340 U.S. 15 (1950).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE

Solicitor General

RICHARD K. WILLARD

Acting Assistant Attorney General

KENNETH S. GELLER

Deputy Solicitor General

BRUCE N. KUHLIK

Assistant to the Solicitor General

BARBARA L. HERWIG

WENDY M. KEATS

Attorneys

JULY 1984

PETITIONER'S BRIEF

JUL 13 1984

DEBORAH L. STEVENS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

ELIZABETH BRANDON, *et al.*,

Petitioners,

v.

JOHN D. HOLT, etc., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

ELIZABETH A. MCKANNA
686 W. Clover Drive
Memphis, Tennessee 38119

G. PHILIP ARNOLD
300 E. Main Street
P.O. Box 760
Ashland, Oregon 97520

WILLIAM E. CALDWELL
P.O. Box 60996
Fairbanks, Alaska 99706

J. LEVONNE CHAMBERS

ERIC SCHNAPPER*

NAACP Legal Defense and
Educational Fund, Inc.

16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Did the Court of Appeals err in holding that a monetary judgment under Rule 25(d), F.R.C.P., against a public official "in his official capacity" imposes personal liability on the official?¹

¹ A list of the parties is set out at p. ii of the Petition.

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| Question Presented | i |
| Table of Authorities | iii |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Rules Involved | 3 |
| Statement of the Case | 4 |
| (1) The Assault on Petitioners Brandon and Muse | 4 |
| (2) The Policies of the City of Memphis | 7 |
| (3) The Proceedings Below | 18 |
| Summary of Argument | 28 |
| Argument | 30 |
| A Monetary Judgment Against A Public Official "In His Official Capacity" Imposes Liability on the Government Entity for Which the Official Works, Not On the Official Personally | 30 |
| Conclusion | 39 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|---|---------------------------|
| Bertot v. School District No. 1, Albany County, 613 F.2d 245 (10th Cir. 1979) | 36 |
| Campbell v. Bowlin, 724 F.2d 484 (5th Cir. 1984) | 36 |
| Family Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) | 36 |
| Gay Student Services v. Texas A & M University, 612 F.2d 391 (5th Cir. 1980) | 36 |
| Hutto v. Finney, 437 U.S. 678 (1978) | 29,36 |
| Key v. Rutherford, 645 F.2d 880 (10th Cir. 1981) | 36 |
| Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982) | 36 |
| Lehman v. Trout, 79 L.Ed.2d 732 (1984) | 26,27 |
| Monell v. New York Department of Social Services, 436 U.S. 658 (1978) | 15,19, 21,29,34, 35,36,38 |
| Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981) | 36 |
| Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) | 24,25 |

| <u>Cases</u> | <u>Page</u> |
|---|-------------------|
| Owen v. City of Independence, 445 U.S. 622 (1980) | 26,29 30,35,36 |
| Paxton v. Campbell, 612 F.2d 848 (4th Cir. 1980) | 36 |
| Pullman Standard v. Swint, 456 U.S. 273 (1982) | 26 |
| Scheuer v. Rhodes, 416 U.S. 232 (1974) | 26 |
| Universal Amusement Co. v. Hofheinz, 646 F.2d 996 (5th Cir. 1981) ... | 36 |
| Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980) | 36 |
| <u>Rules</u> | |
| Rule 25(d), Federal Rules of Civil Procedure | 3,28 32,33,34 |
| Rule 43(c)(1), Federal Rules of Appellate Procedure | 3,32,38 |
| Rule 801(2)(D), Federal Rules of Evidence | 22 |
| Supreme Court Rule 40.3 | 4 |
| <u>Other Authorities</u> | |
| 28 U.S.C. § 1254(1) | 2 |
| 3B Moore's Federal Practice ¶ 25.01[13] | 28,33 |

NO. 83-1622

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

ELIZABETH BRANDON, et al.,

Petitioners,

v.

JOHN D. HOLT, etc., et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the court of appeals is reported at 719 F.2d 151, and is set out at pp. 28a-43a of the Appendix to the Petition.

The order denying rehearing, which is not reported, is set out at Petition Appendix p. 44a. The district court Findings of Fact, Conclusions of Law and Order are reported at 516 F. Supp. 1355, and are set out at pp. 1a-27a of the Appendix to the Petition.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1983. A timely petition for rehearing was filed, which was denied on December 2, 1983. On February 22, 1984, Justice O'Connor granted an order extending the date on which the petition for writ of certiorari was due until March 31, 1984. The petition for a writ of certiorari was filed on March 30, 1984, and was granted on May 21, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 25(d), Federal Rules of Civil Procedure, provides:

(d) Public Officers; Death or Separation from Office

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

Rule 43(c)(1), Federal Rules of Appellate Procedure, provides:

(c) Public Officers; Death or Separation from Office

(1) When a public officer is a party to any appeal or other proceeding in the court of appeals in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall not be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

Supreme Court Rule 40.3 provides:

When a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

STATEMENT OF THE CASE

(1) The Assault on Petitioners Brandon and Muse

The events which gave rise to this litigation occurred on the night of March 5, 1977. Petitioners Elizabeth Brandon and James Muse, both high school students, went out on a date in the early evening. Following dinner and several hours at a high school dance, they drove to a secluded street known as Shady Grove and, as young couples are wont to do, parked there. Approximately half an hour later Memphis Police Officer Robert Allen approached the car. Expressly identifying himself as a Memphis City police officer, and displaying his police identification card, Allen ordered Muse to step out of the car. After briefly questioning Muse, officer Allen maliciously, and without provocation assaulted Muse with a knife, slashing his throat from ear to ear. When Officer Allen tried to break into the car where Ms. Brandon was seated, Muse, despite his

injuries, jumped in the driver's side and quickly drove away. Officer Allen then drew his service revolver and shot at the fleeing couple. The bullet shattered a window in the car and struck Brandon in the face. Allen returned to his own vehicle and pursued Brandon and Muse, repeatedly attempting to run their car off the road.

With officer Allen in hot pursuit, Brandon and Muse fled to a local hospital, where both petitioners were treated for injuries sustained in the assault and shooting. Muse required surgery for his wounds, and was permanently disfigured. Neither Brandon nor Muse were ever charged with or suspected of any offense; Officer

Allen was ultimately indicted and convicted of assault with intent to murder in connection with this incident.²

(2) The Policies of the City of Memphis

The officer who assaulted petitioners, the district court concluded, was an "obviously dangerous man" whose "dangerous propensities were widely known among officers of the Department" prior to the attack of March 5, 1977. (Pet. App. 24, 26, 27). The district court noted:

Allen's reputation as a "mental case" was widespread among the officers. Because none of the officers wished to ride in the same squad car with officer Allen, he was frequently relegated to ride by himself.³

² The details of the incident are set forth in the opinions of both the district court and the court of appeals. Pet. App. 5a-8a, 31a-32a. The testimony of petitioners concerning this incident is at pages 10-55 of the trial transcript.

³ Pet. App. 9a. see also Tr. 147 (refused to ride with Allen; "mental case"), 156 (refusal to ride with Allen, "mental case"), 161 (refusal to ride with Allen).

Among the statements made by Allen's fellow officers following the assault on petitioners were "they finally caught up with him"⁴ and "Allen has finally done something this time that he can't get out of."⁵ Three days after the attack, the Commander of the Special Operations Bureau described Allen as "a walking time bomb."⁶

Allen's reputation within the Memphis Police Department was well deserved. When Allen was first hired as a police officer, a psychiatrist retained by Memphis to evaluate such applicants warned that Allen

may ... have difficulty controlling his impulses.... [h]is test data indicated some maladaptive behavior, thus he should be observed and supervised.⁷

⁴ Pet. App. 9a; Tr. 47.

⁵ Pet. App. 9a; Tr. 70, 81.

⁶ See The Commercial Appeal, March 8, 1977.

⁷ Ex. 4, Deposition of E.W. Chapman. Chapman stated that under the Department's procedures neither Allen's precinct commander nor any one else would have seen this warning after he was hired. Pp. 18-19.

By the time of the assault on petitioners some 20 complaints had been filed against Allen, including charges for serious abuse of policy authority and use of unnecessary force. (Pet. App. 11a). Allen had been suspended on one occasion for beating an inmate at the city jail.⁸ On another occasion Allen, apparently angry that a woman had reported a burglary, stopped her car on an interstate highway,

ordered her into his squad car and taunted her for about an hour and a half.... When he released her, she called him a name, and he threw her back into his squad car, taunted her for at least another hour, took her to jail for the night and impounded her car. Although she had presented a valid driver's license when asked, Officer Allen charged her with driving without a license.⁹

⁸ Tr. 223-25.

⁹ Pet. App. 10a-11a. The victim testified "[H]e knocked me up against the hood, grabbed me by the arm, and opened the door, and literally threw me in the police car." Tr. 120. She characterized Allen's conduct during her ordeal as "crazy." Tr. 118.

No action had been taken by the Department regarding the complaint filed with regard to this incident. (Pet. App. 11 a).

Allen's most bizarre conduct apparently arose out of an incident in 1975 when he shot and killed a teenage black youth.¹⁰ On October 18, 1975, Allen spotted the victim apparently engaged in stealing a television set from a closed hotel. After chasing the suspect on foot, Allen drew his service revolver and shot him. The circumstances of the killing prompted authorities to refer the case to the grand jury, but the grand jury refused to indict Allen.¹¹ Thereafter Allen repeatedly bragged about the killing; a fellow officer remarked of Allen, "[H]e thought it was a great thing, you know to be

¹⁰ Ir. 145, 24 D-45. The details of the incident are set out in a Firearms Use Report filed by Allen. There was no claim that the victim was armed.

¹¹ Ir. 157-8.

a police officer and kill somebody."¹² Allen expressed to his fellow officers a morbid interest in the nature of the lethal wounds he had inflicted on his victim.¹³ Allen referred to a pair of gloves in his possession as his "killing gloves," and he would ceremoniously put on those gloves when he was called to the scene of a crime. (Pet. App. 9a)¹⁴

Officer Allen, in short, was an obviously and exceptionally dangerous man whom no sensible police department would have armed with a gun and a badge and set loose on the local citizenry. The district court held that Allen's immediate supervisors were

¹² Pet. App. 9a; Ir. 148.

¹³ Pet. App. 9a; Ir. 151 ("You know, guys, I sure would like to get that lead, and see what kind of spread it had when it went in him, what kind of damage it did to him.")

¹⁴ Allen later said of the effect of the 1975 shooting, "I was not mentally strong enough to hold a job as a police officer.... I had occasion to shoot a man and I killed him in the line of duty. I was not able to comprehend that or to carry that burden." Transcript of Hearing Before Magistrate, 1982, p. 4.

aware of his dangerous propensities. (Pet. App. 25a). One of Allen's fellow officers, in successfully seeking to avoid riding in a squad car with Allen, had described Allen's abberant behavior to their captain,¹⁵ and Allen himself stated that he had spoken about his problems with "upper echelon people."¹⁶ The district court concluded that Allen had been kept on the force despite his well known propensity for violence as a result of four Memphis City policies.

First, the procedures followed by Chapman and his predecessors deliberately and systematically insulated the Director of Police from any knowledge of violence or other misconduct by police officers, thus assuring that they would never take steps to correct or prevent such action. (Pet. App. 23a-24a). At least until 1977, it was Departmental policy never to show the

¹⁵ Tr. 147, 158-59.

¹⁶ Transcript of Hearing before United States Magistrate, 1982, p. 5.

Director complaints or internal reports regarding policy brutality.¹⁷ Even though Director Chapman sent an individual letter to every person filing such a complaint, assuring the complainant that the matter was being investigated, the form letter Chapman signed never mentioned either the incident complained of or name of the officer involved, thus leaving Chapman ignorant of what his subordinates were doing.¹⁸ The District Court concluded that, under procedures which still remained in effect at the time of the trial, the Department imposed on its supervisors no duty to discover officers who might have dangerous propensities, and no duty to report known problems to Chapman or anyone else. (Pet. App. 13a). The Police Director has never taken any affirma-

¹⁷ Tr. 172-174, 215-17.

¹⁸ Pet. App. 15a-23a; Tr. 185, 189.

tive steps to learn of officer misconduct from precinct level supervisors. (Pet. App. 13a-14a).

Second, there was throughout the Department a code of silence binding patrolmen and supervisors alike not to testify against or report on their colleagues. (Pet. App. 14, 22-23). That code is enforced by peer pressure, and tacitly sanctioned by the refusal of the Department to impose on its employees any obligation to disclose, even under questioning, misconduct by their fellow officers. (Pet. App. 13a). Chapman candidly acknowledged, "We have never, since I have been director, had the first single case where officers would really cooperate in terms of telling us on an official basis what they knew about a fellow officer."¹⁹ The only step Chapman ever took to end this practice was to provide a

¹⁹ Tr. 178; see also 184, 196, 202-03, 204, 210.

psychological counseling service for officers.²⁰ The code of silence which pervaded the Department and was tolerated by its highest officials was precisely the sort of custom referred to in Monell v. New York City Department of Social Services, 436 U.S. 658, 691 (1978).

Third, until July of 1980 it was the policy of the Department never to reassign an officer from a position for disciplinary reasons. As Chapman explained, "any transfer for any wrongdoing or for any suspect of wrongdoing ... was specifically prohibited."²¹ Because of this restriction, which for years was contained in the agreement between the city and the police union (Pet. App. 14), Chapman would not and could not have reassigned a violent officer from patrol work to a desk job. The termination of this policy in 1980 had in

²⁰ Tr. 204.

²¹ Tr. 192; see also Tr. 178, 193, 196-98, 199.

Chapman's words "very positive results" (Tr. 193), but it was a change which came several years too late to prevent the assault on petitioners.

Finally, any disciplinary action involving the dismissal of an officer or a suspension in excess of 10 days required approval of the city Civil Service Commission, whose members were chosen by the mayor. It was in Chapman's view the policy²² of the Commission never to uphold the dismissal of an officer if it were based on violent misconduct.²³ Chapman testified that he had on one occasion attempted to dismiss an officer whose conduct he described as "very similar to" Allen's; that officer had threatened to shoot his lieutenant, and had become so excited while pistol-whipping a defendant that he passed out.²⁴ The Civil Service Commission, however, reinstated the

²² Tr. 180, 195.

²³ Pet. App. 14a-15a, 23a.

²⁴ Tr. 183-84.

dismissed officer.²⁵ Based on that case and similar incidents it was apparently Chapman's practice not to attempt to fire an officer for brutality, since he believed such dismissals would inevitably be overturned.²⁶

Chapman accurately characterized the disciplinary situation within the Department at the time of the assault on petitioners as "hopeless."²⁷ Under the City policies then in effect the Director was insulated from information regarding officers whom even their colleagues knew to be unstable and dangerous, and the Department was unwilling to actually mete out any significant punishment to officers found guilty of misconduct. Immune from any scrutiny by the Police Department, Memphis police officers were armed not only with a gun but also with a license to attack citizens virtually at

²⁵ Tr. 184; Pet. App. 23a; see also Tr. 208.

²⁶ Pet. App. 15a; Tr. 195.

²⁷ Tr. 198.

will. Chapman acknowledged, "in my opinion ... probably many cases were not handled as they should be. It was not the emphasis on the responsibility of the department or the individual officers as there should have been." (Tr. 208-09). Officer Allen was clearly one of those mishandled cases.

(3) The Proceedings Below

Petitioners commenced this action against Officer Allen and Director Chapman²⁸ on February 22, 1978, in the United States District Court for the Western District of Tennessee. Both the caption and the body of the complaint named as a defendant "E. Winslow Chapman, Director of Police" (J.A. 4a); neither suggested that Chapman was sued only in his personal capacity. An answer was filed on Chapman's behalf by the Memphis City Attorney, who has continued to repre-

²⁸ The complaint also named as a defendant the Mayor of Memphis. The district court granted a motion to dismiss on behalf of the Mayor on July 13, 1978.

sent Chapman throughout these proceedings. Any uncertainty that might have existed regarding the capacity in which Chapman was sued was definitively resolved more than 19 months prior to trial. In response to a motion for summary judgment also filed on Chapman's behalf by the Memphis City Attorney, counsel for petitioners stated unequivocally:

Defendant Chapman is sued in his official capacity as Director of Police Services, City of Memphis Tennessee. "[O]fficial capacity suits generally represent an action against an entity of which an officer is an agent...." Monell v. New York Department of Social Services, 436 U.S. 658, 690 n.55 (1978).²⁹

²⁹ Response to Renewed Motion for Summary Judgment of Defendant E. Winslow Chapman, p. 2. this document also alleged that certain city policies alleged to have caused the assault on petitioners were carried out by "[d]efendant Chapman, acting in his official capacity." Id. p. 3.

This statement clearly put both Chapman and the City Attorney on notice that petitioners were not seeking a personal judgment against Chapman, and that any monetary award would have to be paid by the city itself.

A default judgment was entered against Officer Allen. The case proceeded to trial against Director Chapman in September, 1980. Throughout the trial it was repeatedly made clear that the action was against Chapman only in his official capacity, and that petitioners contemplated that if they prevailed the judgment would as a practical matter run against the city. In his opening statement counsel for petitioners emphasized:

Mr. Chapman is sued in this lawsuit in his official capacity, and as was stated in Monell versus New York City Department of Social Services, a 1978 Supreme Court case, official capacity suits generally represent

only another way of pleading an action against an entity of which an officer is an agent.³⁰

Counsel for petitioners also acknowledged that under Monell the critical factual issue was whether the assault on petitioners Brandon and Muse was the result of Memphis City policies:

The suit against Mr. Chapman in his official capacity is one which addresses itself to what we allege are problems within the Memphis Police Department.... [T]he determination for the Court to make is whether ... these policies which allow a person of the nature of Robert Allen to go about the streets of Memphis, Tennessee, with his service revolver and all the other trappings of a police officer ... deny equal protection of the law....³¹

During the course of the trial the district court ruled admissible hearsay testimony regarding out of court statements by several

³⁰ Tr. 6. Counsel for petitioners referred at two other points in his opening statement to the fact that Chapman was sued in his official capacity.

³¹ Tr. 7.

police officers, on the ground that such officers were agents or employees of a party.³² Since the officers in question were employees and agents of the City of Memphis, not of Chapman personally, that decision reflected the court's understanding that it was the City which was the defendant. In discussing the admissibility of other evidence, counsel for petitioners reiterated, "Mr. Chapman is not sued individually, but in his official capacity.... [W]hether or not Mr. Chapman is liable in his personal capacity, that's not the issue in the lawsuit."³³

The district judge found Chapman liable for the violations of petitioners' constitutional rights. In his Findings of Fact the judge emphasized on three occasions that the action and his finding of liability were only against Chapman "in his official

³² Tr. 17-21, 45-47. See Rule 801(2)(D), Federal Rules of Evidence.

³³ Tr. 202, 233.

capacity."³⁴ The judge also made clear his understanding that the judgment was to be paid by the city, citing this Court's holding in Monell that "official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent...." (Pet. App. 16a-17a).

That understanding permeated the lower court proceedings which followed. The trial court referred the assessment of damages to a magistrate (J.A. 21a). In their brief concerning damages, petitioners expressly noted that the trial court had found Chapman "to be liable in his official capacity for the injuries suffered by the plaintiffs."³⁵

The City Attorney not only emphasized in his

³⁴ Pet. App. 1a, 16a, 21a. See also id. 26a (Chapman held liable "in his capacity as Director of the Memphis Police Department.")

³⁵ Plaintiff's Pre-Hearing Brief for Award of Compensatory and Punitive Damages, 1; see also id. at 3 (Chapman held responsible "in his official capacity" for injuries to petitioners).

reply brief that the finding of liability was only against Chapman in his official capacity, but relied on that aspect of the trial judge's decision to avoid an award of punitive damages. Citing this Court's decision in Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981), the City Attorney asserted that "no award of punitive damages is to be made against defendant Chapman since he was found liable in his official capacity."³⁶ Since Newport, while forbidding awards of punitive damages against municipalities, had expressly upheld such awards against individual municipal officials, the argument thus advanced by the City Attorney made no sense unless he too understood that the award against Chapman "in his official capacity" was in fact an award against the City of Memphis. The Magistrate shared respondent's view on that issue, holding

³⁶ Brief of Defendant E. Winslow Chapman on issue of Damages, 1.

that "no punitive damages may be awarded against defendant Chapman, since he was sued as Director of the Memphis Police Department. City of Newport v. Fact Concerts, Inc." (J.A. 32a). In calculating the compensatory damages allowable against defendant Chapman, the Magistrate refused to take into consideration any additional psychological harm suffered by petitioners due to the fact that the assault had been carried out by a police officer (J. A. 23a-27a). The district court approved the magistrate's recommendations. (J.A. 35a-37a). Both parties appealed.

While the case was on appeal Chapman left office, and was replaced as Police Director in December 1982 by John D. Holt. Since the lower court decision was against Chapman in his official capacity, Holt was automatically substituted as the named defendant by operation of Rule 43(c)(1), Federal Rules of Appellate Procedure. On

October 11, 1983, the court of appeals held that this litigation against Chapman in his official capacity was "a suit against an individual, not the city." (Pet. App. 39a). Petitioners urged on appeal that as a matter of law no good faith defense was available, since a municipality can assert no such defense under Owen v. City of Independence, 445 U.S. 622 (1980). The court of appeals, having concluded that a judgment against Chapman in his official capacity was a judgment against him personally, held that Chapman could assert such a good faith defense under Scheuer v. Rhodes, 416 U.S. 232 (1974). Although the district court had understandably never addressed the factual issues involved, the Sixth Circuit then proceeded to consider the merits of the good faith claim, and concluded that Chapman had demonstrated the necessary benign intention. (Pet. App. 38a). Compare Pullman Standard v. Swint, 456 U.S. 273, 292 (1982); Lehman

v. Irout, 79 L.Ed.2d 732 (1984). Accordingly, the court of appeals directed that the claims against Chapman "in his official capacity" be dismissed. The court of appeals also ruled that the Magistrate had erred in refusing to consider in assessing damages the additional intangible injury suffered by petitioners because the assault at issue occurred under color or law. (Pet. App. 40a-44a). That part of its opinion, however, concerned only the amount of damages available against officer Allen. Allen, who never participated in the proceedings in the district court or court of appeals, is apparently judgment proof.

Petitioners sought review by this Court of the court of appeals' decision regarding the legal significance of a judgment against a municipal official in his "official capacity," noting that the Sixth Circuit's opinion was in conflict with decisions of several other circuits. (Pet. 21-28).

SUMMARY OF ARGUMENT

Suits against a public officer in his or her official capacity have long been recognized as a method of suing the entity for which the official works. Rule 25(d)(1), Federal Rules of Civil Procedure, provides for the automatic substitution of a new official who replaces an official being sued in his or her official capacity. If a judgment against a defendant in his official capacity imposes personal liability, then Rule 25(d)(1) would have the effect of imposing personal liability on a new official for the acts of his or her predecessor. The Committee Note to Rule 25(d)(1) expressly states that such "official capacity" actions are "brought in form against a named officer, but intrinsically against the government." 38 Moore's Federal Practice ¶ 25.01[13].

This Court has on three separate occasions held that a monetary judgment against an official in his or her "official capacity" is to be paid by the entity for which he or she works. Monell v. New York City Department of Social Services, 436 U.S. 658, 690 n.55 (1978); Owen v. City of Indenpendence, 445 U.S. 622, 638 n.18 (1980); Hutto v. Finney, 437 U.S. 678, 693 (1978).

This case was litigated, tried, and adjudicated as an action against the Memphis Director of Police in his official capacity. Petitioners made clear in a pleading filed 19 months prior to trial that Director Chapman was sued only in his official capacity, and that any judgment would thus have to be paid by the city. At trial counsel for petitioners repeatedly reiterated that Chapman was sued only in his official capacity. The district court's Findings of Fact emphasized at three

different points that Chapman was being held liable only in his official capacity, and makes clear the understanding of the trial judge that the resulting judgment was a judgment against the city.

ARGUMENT

A Monetary Judgment Against A Public Official "In His Official Capacity" Imposes Liability on the Government Entity for Which the Office Works, Not on the Official Personally

The question presented by this case is whether a monetary judgment against a municipal official in his official capacity imposes liability on the official personally, or on the government body for which the official works. If such a judgment is to be paid by the government entity, no good faith defense exists. Owen v. City of Independence, 445 U.S. 622 (1980). If the judgment runs against the personal funds of the named

official, he or she is entitled to assert the good faith defense recognized in Scheuer v. Rhodes, 416 U.S. 232 (1974).

The answer to that question is apparent on the face of Rule 25(d)(1), Federal Rules of Civil Procedure, which provides that when an official who is party to an action in his or her official capacity leaves office, his or her successor is automatically substituted as a party. Similar provisions are to be found in Rule 43(c)(1) of the Federal Rules of Appellate Procedure and Supreme Court Rule 40.3.

If an action and judgment against a government employee in his or her official capacity imposed personal liability, then the effect of the automatic Rule 25(d)(1) substitution would be to make the successor official personally liable for the actions and torts of his or her predecessor, at least where the predecessor was the defendant in a civil action at the time he or she

left office. In this case, for example, while the appeal was pending in the Sixth Circuit, John Holt replaced E. Winslow Chapman as Director of the Memphis Police Department, and by operation of Appellate Rule 43(c)(1) Holt was automatically substituted as the defendant-appellant. Had the defendant's appeal been unsuccessful, Holt rather than Chapman would have been liable in his official capacity for the award of \$26,210.75 in damages. It was certainly not the intent of either the framers of Rule 25(d)(1) or of the district judge in this case that Director Holt should be mulct in damages for an assault that occurred more than five years before he took office as Director.

The Committee Note accompanying the 1961 revision of Rule 25(d) makes clear that a judgment against an official in his or her official capacity runs only against the entity for which he or she works. Such

official capacity lawsuits, the Note observed, were "bought in form against a named officer, but intrinsically against the government."³⁷ The Committee Note explained that in a Rule 25(d) action against an officer "in his official capacity" any judgment was to provide "relief ... by the one having official status, rather than one who has lost that status and power through ceasing to hold office."³⁸ Rule 25(d) "official capacity" actions were by definition limited to litigation seeking relief against whichever official might hold the office. A plaintiff seeking a monetary award to be paid by the government is directed by Rule 25(d) to sue the relevant official "in his official capacity"; a plaintiff seeking such an award against an official to be paid "out of [his] own

³⁷ Quoted in ³⁸ Moore's Federal Practice,
§25.01 [13].
³⁸ Id.

pocket[]"³⁹ is placed on notice that an award against the official "in his official capacity" imposes no such personal liability.

This Court has three times held that in a Rule 25(d) action against an official "in his official capacity" any monetary award runs against the public entity for which the official works, not against the official personally. In Monell v. New York Department of Social Services, 436 U.S. 658, 690 n.55 (1978), the Court explained:

since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent ... our holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which, as here, a local government would be suable in its own name.

³⁹ Id.

Because it regarded a suit against an official in his official capacity as a suit against the governmental entity for which he worked, the Court in Monell held such "official capacity" suits proper when, but only when, the entity itself could be sued.

A similar conclusion with regard to good faith immunity was reached in Owen v. City of Independence, 445 U.S. 622 (1980). The plaintiff in that case had sued the city of Independence and certain city officials "in their official capacities." 445 U.S. 630. In upholding an award of backpay this Court emphasized:

The governmental immunity at issue in the present case differs significantly from the official immunities involved in our previous decisions. In those cases, various government officers had been sued in their individual capacities.... Here, in contrast, only the liability of the municipality itself is at issue, not that of its officers ... 445 U.S. 638 n.18 (Emphasis added).

Thus both for purposes of jurisdiction under Monell, and in assessing a claim of immunity under Owen, this Court has adhered to the intent of the drafters of Rule 25(d) and treated an action against an official "in his official capacity" as an action against the entity for which he works. The courts of appeals have generally treated official capacity actions in the same manner.⁴⁰

In Hutto v. Finney, 437 U.S. 678 (1978), the court of appeals ordered the defendants, who were the Arkansas Commissioner of

⁴⁰ Paxman v. Campbell, 612 F.2d 848, 856 (4th Cir. 1980); Campbell v. Bowlin, 724 F.2d 484, 489 n.4 (5th Cir. 1984); Universal Amusement Co. v. Hofheinz, 646 F.2d 996, 997 (5th Cir. 1981); Van Ooteghem v. Gray, 628 F.2d 488, 496 (5th Cir. 1980); Family Unidas v. Briscoe, 619 F.2d 391, 403 (5th Cir. 1980); Gay Student Services v. Texas A & M University, 612 F.2d 160, 164 (5th Cir. 1980); Kincaid v. Rusk, 670 F.2d 737, 742 n.7 (7th Cir. 1982); Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981); Bertot v. School Dist. No. 1, Albany County, 613 F.2d 245, 247 n.1 (10th Cir. 1979); Key v. Rutherford, 645 F.2d 880, 883 n.5 (10th Cir. 1981).

Correction and the members of the Arkansas Board of Correction, to pay the plaintiffs \$2,500 in counsel fees. This Court commented:

The order does not expressly direct the Department of Correction to pay the award, but since [the defendants] are sued in their official capacities, and since they are represented by the Attorney General, it is obvious that the award will be paid with state funds.

437 U.S. at 693. The effect of the award in the instant case is equally clear.

The instant case was litigated, tried, and adjudicated as an action against the Memphis Director of Police "in his official capacity." The District Judge emphasized at three separate points in his Findings of Fact and Conclusions of Law that the Director was sued "in his official capacity."⁴¹ The Magistrate to whom the judge referred the calculation of damages noted

that the court had found Director Chapman liable in his capacity as Director of the Police Department.⁴² The district judge clearly contemplated that the damages which he had awarded would be paid by the city of Memphis, not by Director Chapman personally. Quoting this Court's opinion Monell, Judge Horton declared that an "official capacity suit[] ... represent[s] only another way of pleading an action against an entity of which an officer is an agent."⁴³

The Sixth Circuit in reversing the district court judgment for petitioners assumed that an action and judgment against Chapman in his official capacity were as a matter of law an action and judgment against Chapman personally. (Pet. App. 39a). At the time of the Sixth Circuit's decision former Director Chapman, by operation of Appellate Rule 43(c)(1), was no longer even

⁴¹ Pet. App. 1a, 16a, 25a.

⁴² J.A. 21a.

⁴³ Pet. App. 16a.

a party to the appeal, having been replaced by Director Holt. The decision of the court of appeals is clearly in conflict with both the federal rules and the decisions of this Court.

CONCLUSION

For the foregoing reasons the judgment and opinion of the court of appeals should be reversed.

Respectfully submitted,

ELIZABETH A. McKANNA
686 W. Clover Drive
Memphis, TN 3819

G. PHILIP ARNOLD
300 E. Main Street
P.O. Box 76U
Ashland, Oregon 97520

WILLIAM E. CALDWELL
P.O. Box 60998
Fairbanks, Alaska 99706

J. LeVONNE CHAMBERS
ERIC SCHNAPPER •
NAACP Legal Defense &
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, N.Y. 10013
(212) 219-1900

Counsel for Petitioners
• Counsel of Record

JOINT APPENDIX

No. 83-1622

Office Supreme Court, U.S.
FILED

JUL 13 1984

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

ELIZABETH BRANDON, *et al.*,

Petitioners,

v.

JOHN D. HOLT, *etc., et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

ELIZABETH MCKANNA
686 W. Clover Drive
Memphis, Tennessee 38119

G. PHILIP ARNOLD
300 Main Street
P.O. Box 760
Ashland, Oregon 97520

WILLIAM E. CALDWELL
P.O. Box 60996
Fairbanks, Alaska 99706

J. LEVONNE CHAMBERS
ERIC SCHNAPPER*
NAACP Legal Defense and
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioners

HENRY L. KLEIN*
1500 First Tennessee Building
Memphis, Tennessee 38103
(901) 523-2363

CLIFFORD D. PIERCE, JR.
City Attorney
Room 314
125 North Mid-America Mall
Memphis, Tennessee 38103
(901) 528-2614

Counsel for Respondents

*Counsel of Record

PETITION FOR CERTIORARI FILED MARCH 30, 1984

CERTIORARI GRANTED MAY 21, 1984

BEST AVAILABLE COPY

43 PR

No. 83-1622

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

ELIZABETH BRANDON, et al.,
Petitioners,

v.

JOHN D. HOLT, etc., et al.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| Relevant Docket Entries | 1a |
| Complaint, February 22, 1978 | 3a |
| Order Granting Summary Judgment for Defendant Wyeth Chandler, | |

| | <u>Page</u> |
|--|-------------|
| July 13, 1978 | 13a |
| Findings of Fact, Conclusions of Law, and Order, July 8, 1981 | 19a |
| Report and Recommendations of Magistrate, February 8, 1982 | 20a |
| Order Approving and Adopting Report and Recommendations of United States Magistrate as Judgment of Court, May 4, 1982 | 35a |
| ... | |
| Opinion of the Court of Appeals, October 11, 1983 | 38a |
| Order of the Court of Appeals Denying Petition for Rehearing En Banc, December 2, 1983 | 39a |

RELEVANT DOCKET ENTRIES

| <u>Date</u> | <u>Proceeding</u> |
|-------------------|---|
| February 22, 1978 | Complaint |
| April 14, 1978 | Motion to dismiss or in the alternative, motion for summary judgment on behalf of defendants, Chandler and Chapman |
| May 24, 1978 | Order regarding summary judgment motion and request for production of documents |
| July 13, 1978 | Order granting summary judgment for defendant Wyeth Chandler |
| July 24, 1978 | Answer of E. Winslow Chapman |
| August 23, 1978 | Request for default ... as to defendant Robert J. Allen |
| August 23, 1978 | Entry of default ... |
| January 26, 1979 | Renewed motion for summary judgment in behalf of defendant, E. Winslow Chapman |

| | |
|--------------------|---|
| March 13, 1979 | Order denying defendant Chapman's motion for summary judgment |
| September 29, 1980 | Minutes: Non-jury trial began.... |
| September 30, 1980 | Minutes: Non-jury resumed |
| July 8, 1981 | Findings of fact, conclusions of law and order.... |
| August 18, 1981 | Order of reference -- for hearing and recommendation on amount of damages |
| February 8, 1982 | Report and recommendation (Magistrate] Allen).... |
| May 5, 1982 | Order approving and adopting report and recommendation of United States Magistrate as judgment of court.... |
| May 20, 1982 | Notice of Appeal (E. Winslow Chapman...) |
| June 3, 1982 | Notice of Appeal (Plaintiff ...).... |

COMPLAINT

JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202. This is an action for damages for assault and battery and for declaratory relief arising under 42 U.S.C. §§ 1983, 1988, and the Fourteenth Amendment of the United States Constitution, to redress the deprivation, under color of Tennessee law of rights, privileges and immunities secured by said statutory and constitutional provisions.

2. The matter in controversy herein exceeds the jurisdictional sum of \$10,000.00 exclusive of interest and costs.

PLAINTIFFS

3. Plaintiffs, Elizabeth Anne Brandon and James Sherman Muse are adult citizens of the United States and the State of Tennessee, residing in Memphis, Shelby County, Tennessee.

DEFENDANTS

4. Wyeth Chandler, is the Mayor of Memphis, Tennessee and was the Mayor at the time the incident complained of herein happened. In his capacity as Mayor of Memphis, Tennessee he is responsible for the overall administration of the Memphis Police Department.

5. E. Winslow Chapman was the Director of Police at the time of the incident complained of herein and was directly responsible for overall operation of the Memphis Police Department. He was appointed by defendant Chandler and was acting with the approval of defendant Chandler.

6. Robert J. Allen was employed by the Memphis Police Department at the time of the incident complained of and is sued herein both individually and in his official capacity.

7. On March 5, 1977, at approximately 11:30 P.M. following dinner and dancing the plaintiffs, Elizabeth Anne Brandon and James Sherman Muse, drove to the Memphis Hunt and Polo Club at 630 Shady Grove Lane, Memphis, Tennessee. The plaintiff, James Sherman Muse, was at the wheel.

8. Plaintiff Muse pulled the car in the driveway of the Memphis Hunt and Polo Club, turned the car around facing Shady Grove Lane and parked.

9. A period of about thirty (30) minutes elapsed before a Chevrolet Pick-up truck entered the drive where the plaintiffs were parked. The truck proceeded down the drive to the club house and returned a few

minutes later, stopping when it reached the plaintiff's car. The occupant of the truck shined a blinding light into the car.

10. A man, later identified as Patrolman R. J. Allen, dressed in a short navy blue jacket and dark pants stepped from the pickup truck and approached the plaintiff's vehicle.

11. He identified himself to both plaintiffs as a Memphis police officer and showed the plaintiffs an official Memphis Police Department Identification card bearing his photograph and the name of Robert J. Allen.

12. He ordered the plaintiff Muse to get out of the car and directed him to the rear of the car.

13. Once both Officer Robert J. Allen and the plaintiff Muse reached the rear of the car, the following conversation took place:

Allen: "Do you know you are on private property?"

Muse: "Yes Sir"

Allen: "Son do you know that's illegal?"

Muse: "Yes, sir I do"

PAUSE

Muse: "Well, sir, what do you want me to do?"

14. A few seconds after plaintiff Muse's last response, Officer Robert J. Allen maliciously, sadistically, and without provocation, struck and cut plaintiff Muse on the neck, the blow causing Muse to fall to his knees behind the car.

15. While plaintiff Muse was on his knees, Officer Robert J. Allen gripped Muse's head and cut his ear and head with a knife, and stated, "If you scream, I'll kill you".

16. Muse slumped to the ground, and Officer Robert J. Allen walked away.

17. Officer Robert J. Allen returned to the passenger side of the car and asked that the plaintiff, Elizabeth Anne Brandon get out of the car.

18. Robert J. Allen was at the door of the passenger side of the car when plaintiff Muse managed to scramble back into the driver's seat and start the car.

19. As the plaintiff's car sped away from the driveway, Officer Robert J. Allen fired a shot from his service revolver into the car shattering the front window on the driver's side. The flying glass from the window injured both plaintiffs. Part of the bullet came to rest in plaintiff Brandon's cheek.

20. Officer Robert J. Allen followed in his pickup truck, bumper to bumper, in a high speed chase which culminated at St. Joseph Hospital East, 5959 Park Avenue, Memphis, Tennessee where the plaintiffs sought medical help and reported the crime.

21. As a result of the brutality suffered at the hands of Robert J. Allen, plaintiff Muse was severely injured. His injuries required hospital treatment and resulted in permanent scars on plaintiff Muse's neck and ear.

22. Plaintiff Brandon sustained facial cuts from flying glass and part of the bullet fired from Robert J. Allen's service revolver lodged in her cheek.

23. Plaintiff Muse has suffered great bodily pain and injury and both plaintiffs have suffered fear and mental anguish; have been subjected to harassment by members of the community and have been required to seek medical care and treatment for their injuries. Both plaintiffs will bear the physical and mental scars of this experience all of their lives.

24. Plaintiff Muse sustained property damage to his vehicle as a result of the shot fired into the car by Robert J. Allen.

25. Although Robert J. Allen was technically "off duty" at the time of the incident complained of herein, all Memphis police officers are required to carry their guns and official identification documents with them at all times and they are authorized and empowered to act in their official capacities as police officers when off duty. Thus, the acts of defendant Robert J. Allen complained of herein, were done under color of state law.

26. Defendants Chapman and Chandler by virtue of their control and responsibility for the operation of the Memphis Police Department knew or should have known that Robert J. Allen was not a good and proper person to be entrusted with the authority, power and responsibility of a police officer.

27. Defendants Chandler and Chapman by their continued employment of Officer Robert J. Allen acted in a manner which was

reckless, willful and wanton against the plaintiffs herein and thus, by this continued employment of Officer Robert J. Allen, defendants Chandler and Chapman have intentionally and under color of state law deprived the plaintiffs of due process of law and are thus liable to them.

WHEREFORE, plaintiffs pray that this Court:

1. Accept jurisdiction of this cause and set this case for speedy hearing.

2. Award the plaintiff, James Sherman Muse, a joint and severable judgment against the defendants in the amount of \$500,000.00 actual and punitive damages for property damage, injuries, pain and suffering and mental anguish sustained as a result of Officer Robert J. Allen's actions.

3. Award the plaintiff, Elizabeth Anne Brandon a joint and severable judgment in the amount of \$500,000.00 actual and punitive damages for injuries, pain and

suffering and mental anguish sustained as a result of the assault and battery and the shot fired by Officer Robert J. Allen into the car in which she was riding.

4. Award plaintiffs all costs, out-of-pocket expenses, a reasonable attorneys fee and such other relief as to the court may appear just and proper.

Respectfully submitted,

NANCY B. SORAK
COLEMAN, SORAK & WILLIAMS
242 Poplar Avenue
Memphis, Tennessee 38103
(901) 522-9861

G. PHILIP ARNOLD
RATNER, SUGARMON, LUCAS,
SALKY & HENDERSON
525 Commerce Title Building

Attorneys for Plaintiffs

By: NANCY B. SORAK

Filed July 13, 1978

ORDER GRANTING SUMMARY JUDGMENT FOR
DEFENDANT WYETH CHANDLER

This action was brought by Elizabeth Anne Brandon and James Sherman Muse under 42 U.S.C. § 1983, to redress the alleged violation of their constitutional rights by defendants. Now before the court is a motion for summary judgment filed by defendants Wyeth Chandler and E. Winslow Chapman.

The complaint alleges the following facts:

Defendant Robert J. Allen approached a car in which plaintiffs were sitting, identified himself as a Memphis police officer, and ordered Muse to get out of the car. Allen then proceeded to brutally assault Muse. When Allen ordered Brandon to

get out of the car, Muse managed to scramble back into the car and drive away. Allen fired his service revolver at plaintiffs' car and struck the windshield. Both plaintiffs were injured by flying glass, and Brandon was struck by a fragment of Allen's bullet. At the time this incident occurred, Allen was off-duty, but, as required by regulation, was carrying his police identification and gun. Memphis police officers are authorized to act in their official capacity even when off-duty.

As to Chapman and Chandler, it is alleged that Chandler as Mayor of Memphis was responsible for the overall administration of the police department, and that Chapman as Director of Police was directly responsible for the overall operation of the police department, at the time of the above-described incident. It is further alleged that Chapman and Chandler knew or should have known that Allen was not "a good

and proper person to be entrusted with the authority, power and responsibility of a police officer." Therefore, the complaint states, the continued employment of Allen as an officer constituted reckless, willful and wanton conduct amounting to an intentional violation of plaintiffs' constitutional rights.

It is undisputed that Chapman and Chandler were not present at the scene of the alleged incident. The affidavits on file show there is no genuine issue as to the facts that Chandler had no knowledge of the incident until some time after it had occurred, and that he did not know, nor had he ever heard of Allen. Chandler had no knowledge prior to the incident of any of Allen's characteristics which might make him unfit for service as a police officer, and had no information which would indicate that Allen should be discharged from his duties as an officer.

It is the opinion of the court that in these circumstances, Chandler is entitled to judgment as a matter of law. A § 1983 action is not maintainable on a respondeat superior theory against superior officers who have neither caused nor participated in alleged deprivation of constitutional rights committed by subordinates. Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973); Adams v. Pate, 445 F.2d 105 (7th Cir. 1971); Moore v. Buckles, 404 F. Supp. 1382 (E.D. Tenn. 1975); Knipp v. Weikle, 415 F. Supp. 782 (N.D. Ohio 1975). See Shannon v. Lester, 519 F.2d 76, 81 (6th Cir. 1975), indicating that the Sixth Circuit has yet to rule on this question. Cf. Monell v. Dept. of Social Services, ___ U.S. ___, 46 U.S.L.W. 4569 (June 6, 1978) (Monell held that a municipality could not be held liable under § 1983 on a strict respondeat superior theory. The rationale of this holding would seem to preclude respondeat superior liability for

superior officials, as well.)

It is true that a superior may be liable for his own participation in the deprivation of constitutional rights, where he affords a subordinate with a known tendency to commit constitutional violations an opportunity to commit them. However, as noted above, Chandler had no knowledge of any such propensity on Allen's part.

As to the defendant Chapman, affidavits have been filed which, if uncontroverted, would show that he, like Chandler, had no knowledge of the incident from which this action arises, or of any dangerous propensities on the part of defendant Allen. However, plaintiffs have discovered documents which tend to show that Chapman was, in fact, aware of departmental investigations into prior complaints regarding Allen's conduct as a police officer. The

record is somewhat incomplete in this regard and the court would be extremely reluctant to rule on the matter at this time. The motion for summary judgment for defendant Chapman is therefore denied, with leave to file a renewed motion for summary judgment if additional discovery shows that there is actually no genuine issue as to Chapman's lack of knowledge.

For the reasons stated above, defendant Chandler's motion for summary judgment is granted, and defendant Chapman's motion for summary judgment is denied.

It is so ORDERED.

enter this 13 day of July, 1978

CHIEF JUDGE

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER
July 8, 1981

[The District Court's Findings of Fact,
Conclusions of Law, and Order are reprinted
at pp. 1a-28a of the Petition]

Filed February 8, 1982

REPORT AND RECOMMENDATION

Plaintiffs Elizabeth A. Brandon (hereinafter "Brandon") and James Sherman Muse (hereinafter "Muse") have brought an action pursuant to 42 USC §§ 1983 and 1988, as well as the Fourteenth Amendment of the Constitution of the United States, for actual and punitive damages, as well as other relief, for an alleged assault and battery committed upon them by defendant Robert J. Allen, who was at the time an officer with the Memphis Police Department. Suit was also brought against E. Winslow Chapman, the Director of the Memphis Police Department. The theory of recovery was his inaction in the face of knowledge of Allen's dangerous propensities.

A default judgment was taken against defendant Robert J. Allen, upon his failure to respond to this litigation. The court ruled that defendant Chapman should have

known of Allen's dangerous propensities, considering the totality or all the circumstances of the case, and should have taken steps to dismiss Allen from the police force. Therefore, the court ruled that Chapman's unjustified inaction was the cause of plaintiff's damages and injuries, and Chapman was held liable in his capacity as director of the Memphis Police Department.

This cause was referred to the United States Magistrate for a hearing and a recommendation on the amount of damages to be awarded. Briefs were filed by counsel for plaintiffs Brandon and Muse and counsel for defendant Chapman. Notice was given to Allen, but no brief was filed on his behalf. The parties were given an opportunity to produce evidence. However, plaintiffs Brandon and Muse, as well as defendant Chapman elected to proceed upon portions of the evidence adduced at the liability trial, as well as the deposition of Dr. Asghar

Koleyni, and exhibits presented at the trial. Oral arguments were heard. At the time of oral argument, defendant Robert J. Allen appeared, without counsel, and was given an opportunity to make a statement, and did so.

The cause is now ready for disposition. This report will be divided into two parts: (1) compensatory damages; and (2) punitive damages.

COMPENSATORY DAMAGES

A. Generally in determining an appropriate award for a plaintiff entitled to damages for the unconstitutional deprivation of his federally-protected civil rights, the courts have said that he (or she) is entitled to be put in the same position, so far as money can do it, as he (or she) would have been, had there been no injury. That is, the court is to compensate him (or her) for the injury actually sustained. Krueger v. Miller, 489 F. Supp. 321, at 331

(E.D. Tenn. 1978), aff'd without opinion, 617 F. 2d 603 (6th Cir. 1980). In addition to actual out-of-pocket losses, and actual physical injuries, mental and emotional distress may be considered as factors in determining an appropriate award for damages. Carey v. Piphus, 435 U.S. 247, at 262 (1978). Pain and suffering should also be considered.

Plaintiffs have, however, contended that they are entitled in addition to the foregoing, to an independent award for the violation of civil rights. In effect, the contention is that a plaintiff who is injured as a result of the violation of his constitutional rights should be entitled to recover more than an individual injured similarly only as the result of a common-law or non-constitutional tort. The case of Herrera v. Valentine, 653 F.2d 1220, at 1231 (8th Cir. 1981) is cited. Although this case could be said to be distinguishable, it

can arguably be cited for that proposition. To the extent that it does allow for the additional recovery sought herein, however, it is submitted that the opinion is not consistent with controlling law.

An inquiry in this area must start with the case of Carey v. Piphus, 435 U.S. 247 (1978). That case held that in a § 1983 action, in the absence of proof of actual injury, a plaintiff is entitled to recover only nominal damages. The court, in reaching this conclusion, engaged in a lengthy discussion of the principles of damages in Anglo-American law. Id., at 255. The court indicated that the cardinal principle of damages is that of compensation for the injury caused to plaintiff by the defendant's breach of duty. Damage awards under § 1983 should be determined by the compensation principle. Id., at 255. The court stated, at pages 256-257:

"To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages...".

The court, in fact, ruled that an award of damages not based on compensation would constitute a windfall. Id., at 260.

The court did go on to speak of certain special common law torts, in which damages are presumed, such as libel and slander. Further, the court went on to indicate that the common law courts traditionally vindicate deprivation or certain absolute rights that are not shown to have caused actual injury through the award of a nominal sum of money. Id., 266-267. But compensation is emphasized. The word "compensation" is defined as "something given or received as an equivalent for services, debt, loss, injury, suffering, lack, etc.". THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabridged).

The Sixth Circuit has assumed this to be an appropriate interpretation of Carey v. Piphus. The court indicated, in Jordan v. Dellway Villa of Tenn., Ltd., et al., __ F.2d (6th Cir. No. 80-5409, decided October 19, 1981) said:

"... Carey held that when actual damages are not present, the victims of due process violations are still entitled to nominal recovery ... (emphasis added)".

There is no justification for ruling that a person who receives a broken arm as the result or violation of his constitutional rights should be entitled to collect any more money than a person who suffers a broken arm as the result of common law assault and battery. The injury is the same, and the conduct of the defendant is equally as serious. It should be noted that the discussion here only involves compensatory damages. The fact that certain constitutional rights have been violated may be considered in determining whether to

award punitive damages. However, logic and reason do not justify a greater award in constitutional torts, and therefore the following analysis will not consider the fact that defendants are guilty of a constitutional tort to enhance the damages awarded.

B. Elizabeth Ann Brandon. The actual physical damages to Brandon would appear on the surface to be minor. She received minor lacerations to her face as the result of the windshield shattering, when Allen fired a shot at the vehicle being driven by Muse (Trial Transcript at 15). It was further determined that a splinter of the bullet lodged in her cheek, and was removed by her father with tweezers a few days later (16). Brandon was treated at the emergency room and required no further treatment (15).

However, Brandon was obviously terrified when she saw Muse, bleeding seriously, and claiming that he was "hurt real bad", attempting to outrun the enraged Allen in a wild vehicle chase to the hospital. She also indicated that, since that time, she has become afraid and cringes when she sees a policeman or police car. This incident disrupted her senior year in high school. Her parents had to escort her on dates because of her fear that Allen might finish what he started to do (Transcript, 18-19).

Under the circumstances, an award of \$5,000.00 jointly against defendants Allen and Chapman would be appropriate, as to plaintiff Elizabeth Ann Brandon.

C. James Sherman Muse. The injuries of plaintiff Muse are considerably more serious than those of plaintiff Brandon. Allen maliciously, and without provocation, struck Muse in the neck and head with his fist, and then stabbed and

cut Muse on the left side of the neck, and on the right side of the head. The cutting on the left side of the neck was dangerously close to the jugular vein, and caused a laceration of some 8 to 10 inches (Trial Transcript at p. 30-33). As a result of this cut, "a fountain of blood" erupted (Transcript at 24). Muse had to be kept awake during his time at the hospital to be sure that the artery or vein in his neck had not been so damaged, as to cause the blood supply to the brain to be cut off (Transcript at 51). This wound was reconstructed by Dr. Asghar Koleyani, a plastic surgeon. However, the injury left a scar on the neck of Muse, which is permanent (Deposition of Dr. Koleyani, at page 12).

As mentioned Muse was also seriously cut on his right ear, with the cut extending down to his right cheek. The right ear was cut through and through (Dr. Koleyani, page 6). While the injury was repaired by Dr.

Koleyni, there will be a permanent scar on his ear, as well as a slight deformity (Deposition of Dr. Koleyni, at page 12). Muse also received a small laceration on the right side of his temple, near the hair line.

Muse was immediately aware of the seriousness of his wound, since he told Ms. Brandon, his date, that he was "hurt real bad" (Transcript of Trial, at pages 8 and 9). Nonetheless, he was concerned for his further well being and the well being of Ms. Brandon, to the extent that he forced himself to get into his automobile and drive to the nearest hospital. In doing so, he had to undergo a harrowing experience, trying to outrun defendant Allen, and being bumped by Allen's vehicle in the process. The fear and emotional distress during this period is self-evident.

The evidence produced at the trial indicates that Muse suffered embarrassment thereafter and has developed a bad attitude toward police officers (Transcript at page 30).

The out-of-pocket expenses incurred by Muse were as follows:

| | | |
|----|----------------------------|---------------|
| 1. | Dr. Ashgar Koleyni | \$525.00 |
| 2. | St. Joseph Hospital East | 385.75 |
| 3. | Depreciation of automobile | <u>400.00</u> |
| | TOTAL | \$1,310.75 |

Muse is therefore entitled to recover from Allen and Chapman, jointly and severally, the sum of \$1,310.75 as out-of-pocket expenses.

Under all the circumstances, taking into account the physical injuries, the pain and suffering, and the emotional and psychic trauma of plaintiff Muse, an additional award of \$20,000.00 appears appropriate.

Therefore, plaintiff Muse should be entitled to recover from defendants Allen and Chapman, jointly and severally, the aggregate sum of \$21,310.75.

PUNITIVE DAMAGES

The parties have agreed as they must, that no punitive damages may be awarded against defendant Chapman, since he was sued as Director of the Memphis Police Department. City of Newport v. Fact Concerts, Inc., ___ U.S. ___, 69 L.Ed.2d 616 (1981).

However, punitive damages must be awarded to both plaintiffs under these circumstances against defendant Allen. There has been a specific finding by the court that defendant Allen acted with malicious intent to deprive plaintiffs of their constitutional rights. Morrow v. Igleburger, 584 F.2d 767, at 769 (6th Cir. 1978).

Punitive damages are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct. City of Newport, id., at 632.

The three categories coalesce in this case. There is a need to punish defendant Allen for his outrageous conduct, performed in his capacity as police officer. Punitive damages are needed to deter him from similar extreme conduct (this is a lesser factor in this cause, since Allen is no longer with the Memphis Police Department). It is also extremely important to impose punitive damages in this case to deter other police officers from similar extreme conduct.

Under these circumstances, it is recommended that each plaintiff individually be awarded the sum of \$25,000.00 against defendant Allen as punitive damages.

The parties are hereby informed that any objections to the foregoing report and recommendation must be filed within ten (10) days or further appeal may be held to have been waived. United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted: This 4th day of February, 1982.

s/s
JAMES H. ALLEN
UNITED STATES MAGISTRATE

Filed May 4, 1982

ORDER APPROVING AND ADOPTING REPORT AND
RECOMMENDATION OF UNITED STATES MAGIS-
TRATE AS JUDGMENT OF COURT

This Court filed its findings of fact, conclusions of law and Order in this lawsuit on July 8, 1981.¹ Thereafter, the Court referred the case to a United States Magistrate for a hearing on the issue of damages and for a recommendation to the Court on the amount of damages that should be awarded plaintiffs. United States Magistrate James H. Allen conducted hearings and considered briefs filed by the parties.

Magistrate Allen filed his report and recommendation with this Court on February 5, 1982. Both plaintiffs and defendant Chapman filed exceptions to that report and recommendation.

¹ Brandon v. Allen, 516 F. Supp. 1355 (W.D. Tenn. 1981).

The Court has read and considered the Magistrate's entire report as well as briefs filed by the parties. Based upon a complete review of the report and the briefs, the Court concurs in the recommendations of the Magistrate and adopts the same as the opinion of this Court. The Court finds the award of \$5,000.00 to Elizabeth Ann Brandon jointly and severally against defendants Robert J. Allen and E. Winslow Chapman to be appropriate. The award of \$25,000.00 punitive damages against defendant Robert J. Allen is approved.

The Court finds the Magistrate's aggregate award of \$21,310.75 to the plaintiff James Sherman Muse against the defendants Robert J. Allen and E. Winslow Chapman, jointly and severally to be appropriate. The award of \$25,000.00 punitive damages against Robert J. Allen in favor of James Sherman Muse is approved.

Finally, this Court will note that since this case was decided the United States Court of Appeals decided the case of Hays v. Jefferson County, Ky., 668 F.2d 869 (6th Cir. 1982). The Court has read that case and, based upon the findings of fact and conclusions of law in this case, finds no inconsistency between its ruling in this case and the ruling of the Sixth Circuit in Hays v. Jefferson County, Ky., supra.

It is therefore by the Court

ORDERED that the Magistrate's Report and Recommendations as to the issue of damages awardable to plaintiffs be and the same is hereby in all things approved and adopted as the judgment of this Court.

All of which is so Ordered this 4th day of May, 1982.

s/s
ODELL HORTON, JUDGE
UNITED STATES DISTRICT COURT

OPINION OF THE COURT OF APPEALS
October 11, 1983

[The Court of Appeals' Opinion is
reprinted at pp. 29a-44a of the Petition.]

ORDER OF THE COURT OF APPEALS
DENYING PETITION FOR
REHEARING EN BANC
December 2, 1983

[The Court of Appeals' Order denying the
petition for rehearing en banc is reprinted
at pp. 45a-47a of the Appendix.]

RESPONDENT'S

BRIEF

No. 83-1622

Office - Supreme Court, U.S.
FILED

AUG 20 1984

JOSEPH L. STEVENS

In the Supreme Court of the United States

October Term, 1984

ELIZABETH BRANDON, et al.,
Petitioners,

vs.

JOHN D. HOLT, etc., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

HENRY L. KLEIN (Counsel of Record)
1500 First Tennessee Building
Memphis, Tennessee 38103
(901) 523-2363

CLIFFORD D. PIERCE, JR.
City Attorney

CHARLES V. HOLMES
Senior Assistant City Attorney

PAUL F. GOODMAN
Assistant City Attorney
314-125 North Mid-America Mall
Memphis, Tennessee 38103
(901) 528-2614

Attorneys for Respondent

QUESTIONS PRESENTED

I.

Was the Court of Appeals correct in holding that a police supervisory official was entitled to a qualified immunity defense based upon good faith?

II.

Was this case tried on the proper standard to impose liability against the Police Director in his official capacity?

III.

Does the decision of the Court of Appeals create a conflict among the Circuits?

LIST OF PARTIES

The plaintiffs in this action are Elizabeth A. Brandon and James D. Muse. The defendants are Robert J. Allen and E. Winslow Chapman, Director of Police, City of Memphis. While the case was pending in the Court of Appeals, Petitioners sought to substitute John D. Holt for E. Winslow Chapman by operation of Rule 43(c)(1), Federal Rules of Appellate Procedure.

TABLE OF CONTENTS

| | |
|---|----|
| Questions Presented | i |
| List of Parties | ii |
| Table of Authorities | iv |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statement of the Case | 2 |
| (a) Proceedings Below | 2 |
| (b) The Incident of March 5, 1977, Involving Of- ficer Allen | 4 |
| (c) Background of Officer Allen | 4 |
| (d) Role of Director Chapman | 6 |
| Summary of Argument | 8 |
| Argument— | |
| I. The Court of Appeals was correct in holding that a police supervisory official was entitled to a qualified immunity defense based upon good faith | 10 |
| II. The case was not tried on the proper stan- dard to impose liability against the Police Director in his official capacity | 16 |
| III. The decision of the Court of Appeals does not create a conflict among the Circuits | 20 |
| Conclusion | 21 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|--------|
| <i>Adams v. Pate</i> , 445 F.2d 105 (7th Cir.1971) | 12 |
| <i>Amen v. Dearborn</i> , 532 F.2d 554 (6th Cir.1976) | 10 |
| <i>Batista v. Rodriguez</i> , 702 F.2d 393 (2d Cir.1983) | 16 |
| <i>Berry v. McLemore</i> , 670 F.2d 30 (5th Cir.1982) | 19 |
| <i>Bonner v. Coughlin</i> , 545 F.2d 565 (7th Cir.1976) | 11 |
| <i>Brandon v. Allen</i> , 719 F.2d 151 (6th Cir.1983) | 1 |
| <i>Brandon v. Allen</i> , 516 F.Supp. 1355 (W.D.Tenn.1981) | 1 |
| <i>Brown v. U.S.</i> , 486 F.2d 284 (8th Cir.1973) | 11 |
| <i>DeVasto v. Faherty</i> , 658 F.2d 859 (1st Cir.1981) | 19 |
| <i>Delaney v. Giarrusso</i> , 633 F.2d 1126 (5th Cir.1981) | 16 |
| <i>Familias Unidas v. Briscoe</i> , 619 F.2d 391 (5th Cir. 1980) | 14 |
| <i>Harris v. City of Roseburg</i> , 664 F.2d 1121 (9th Cir. 1981) | 19 |
| <i>Howell v. Cataldi</i> , 464 F.2d 272 (3d Cir.1972) | 11 |
| <i>Hughes v. Blankenship</i> , 672 F.2d 403 (4th Cir.1982), rehearing and rehearing en banc denied | 14, 18 |
| <i>Jennings v. Davis</i> , 476 F.2d 1271 (8th Cir.1973) | 12 |
| <i>Key v. Rutherford</i> , 645 F.2d 880 (10th Cir.1981), re- hearing denied | 14, 18 |
| <i>Knipp v. Weikle</i> , 405 F.Supp. 782 (N.D.Ohio1975) | 12 |
| <i>Kostka v. Hogg</i> , 560 F.2d 37 (1st Cir.1977) | 11 |
| <i>Leite v. City of Providence</i> , 463 F.Supp. 585 (D.R.I. 1978) | 11 |
| <i>Lewis v. Kugler</i> , 446 F.2d 1343 (3d Cir.1971) | 17 |
| <i>McLaughlin v. City of LaGrange</i> , 662 F.2d 1385 (11th Cir.1981), rehearing and rehearing en banc denied (1982) | 19 |

| | |
|---|------------------------|
| <i>Monell v. New York Department of Social Services</i> , 436 U.S. 658 (1978) | 10, 12, 13, 15, 16, 20 |
| <i>Moore v. Buckles</i> , 404 F.Supp. 1382 (E.D.Tenn.1975) | 12 |
| <i>Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981) | 13 |
| <i>Owen v. City of Independence</i> , 445 U.S. 622 (1980) | 9, 14, 19, 20 |
| <i>Page v. Sharpe</i> , 487 F.2d 567 (1st Cir.1973) | 11 |
| <i>Polk County v. Dodson</i> , 454 U.S. 312 (1981) | 16 |
| <i>Procunier v. Navarette</i> , 434 U.S. 555 (1978) | 15 |
| <i>Richardson v. City of Indianapolis</i> , 658 F.2d 494 (7th Cir.1981) | 19 |
| <i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974) | 18 |
| <i>Shannon v. Lester</i> , 519 F.2d 76 (6th Cir.1975) | 12 |
| <i>Smith v. Ambrogio</i> , 456 F.Supp. 1130 (D.Conn.1978) | 17 |
| <i>Tyler v. Woodson</i> , 597 F.2d 643 (8th Cir.1979) | 19 |
| <i>Van Ooteghem v. Gray</i> , 628 F.2d 488 (5th Cir.1980) | 14 |
| <i>Walters v. City of Ocean Springs</i> , 626 F.2d 1317 (5th Cir.1980) | 19 |
| <i>Williams v. Vincent</i> , 508 F.2d 541 (2d Cir.1974) | 11 |
| <i>Wood v. Strickland</i> , 420 U.S. 308 (1975), rehearing denied 421 U.S. 921 | 15 |

Constitutional and Statutory Authorities:

| | |
|------------------------------------|-----------|
| U.S. Constitution Amend. XIV | 2, 10 |
| 28 U.S.C. §1254(1) | 2 |
| 28 U.S.C. §1331 | 10 |
| 42 U.S.C. §1983 | 2, 12, 16 |
| 42 U.S.C. §1988 | 2, 18 |

Other Authorities

| | |
|---|----|
| 3B Moore's Federal Practice ¶¶25.01[13], 25.09[3] | 15 |
|---|----|

No. 83-1622

In the Supreme Court of the United States

October Term, 1984

ELIZABETH BRANDON, *et al.*,
Petitioners,

vs.

JOHN D. HOLT, *etc., et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at *Brandon v. Allen*, 719 F.2d 151 (6th Cir.1983). The Order Denying Petition for Rehearing en Banc, which is not reported, was filed December 2, 1983. A. 44a.¹ The Findings of Fact, Conclusions of Law, and Order of the District Court are reported at 513 F.Supp. 1355 (W.D.Tenn.1981).

1. Citations to the opinions below are to the appendix to the petition for a writ of certiorari and are designated as A. Citations to the record below are to the Joint Appendix and are designated as App.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 11, 1983. The Petition for Rehearing en Banc was denied on December 2, 1983. The Petition for Writ of Certiorari was filed on March 30, 1984, and was granted on May 21, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. The Proceedings Below

This action was commenced on February 22, 1978, by plaintiffs Elizabeth A. Brandon and James S. Muse seeking damages for assault and battery and declaratory relief under 42 U.S.C. §§1983, 1988, and the Fourteenth Amendment of the Constitution, arising out of an incident on March 5, 1977, involving Memphis Police Officer Robert J. Allen. Complaint Paragraph 1; App. 3a. Named as defendants were Wyeth Chandler, Mayor of Memphis, Tennessee; E. Winslow Chapman, Director of Police, and Robert J. Allen, an employee of the Memphis Police Department. Complaint Paragraphs 4, 5, 6; App. 5a, 6a. The Complaint alleges that defendants Chapman and Chandler knew or should have known that Officer Robert J. Allen was not a good and proper person to be entrusted with the authority and responsibility of a police officer. Complaint Paragraph 26; App. 10a. The Complaint further alleges that defendants Chapman and Chandler acted in a reckless, willful, and wanton manner and that, by their continued employment of defendant Allen, they deprived plaintiffs of due process of law under the color of state law. Complaint Paragraph 27; App. 11a.

On July 13, 1978, pursuant to a Motion for Summary Judgment filed by defendants Chandler and Chapman, an Order was entered granting Summary Judgment for defendant Chandler. Because there was some question whether defendant Chapman knew of any dangerous propensities of Allen, his motion was denied. App. 13a-18a. Due to his failure to appear and answer the charges in the Complaint, a default judgment was entered against defendant Robert J. Allen. App. 1a.

The case went to trial against defendant Chapman without intervention of a jury. Both parties to this case agreed that Mr. Chapman had no actual knowledge of Officer Allen's dangerous propensities. A. 20a. The sole issue before the Court was whether Director Chapman should have known that Officer Allen's dangerous propensities created a threat to the rights and safety of citizens. A. 20a. Following the trial, the case was taken under advisement, and on July 8, 1981, the Court entered an Order finding that because Director Chapman should have known of Officer Allen's dangerous propensities and because he should have taken steps to dismiss Officer Allen from the police force, his unjustified inaction was the cause of plaintiffs' damages and injuries. A. 20a, 21a, 26a.

A Judgment was entered against both Chapman and Allen, and the Court referred the case to the Magistrate for a determination of damages. A. 27a, 28a. The Magistrate filed a Report and Recommendation. App. 20a-34a. Exceptions were filed by plaintiffs and defendant Chapman. On May 4, 1982, the District Judge entered an Order Approving and Adopting the Report and Recommendation of the Magistrate. App. 35a.

Both plaintiffs and defendant Chapman appealed. App. 2a. The Court of Appeals, Judges Lively, Merritt and

Peck reversed, holding that the District Court erred by finding Director Chapman liable for the acts of Officer Allen. A. 33a. The Court found that Chapman acted in good faith and was entitled to immunity. A. 38a. Petition for Rehearing en Banc was denied. A. 45a-47a. Petition for Certiorari was filed on March 30, 1984, and Certiorari was granted on May 21, 1984.

B. The Incident of March 5, 1977 Involving Officer Allen

Respondent adopts the statement of facts relative to this incident set out in the opinion of the United States Court of Appeals, decided and filed October 11, 1983. A. 31a-33a.

C. Background of Officer Allen

A review of Officer Allen's disciplinary resumé indicated that there were only two matters which reflected either unnecessary force or physical abuse. Tr. 221. On a prior occasion Allen, who had been assigned to the city jail, became involved in an altercation with a prisoner. Disciplinary action was taken because Allen acted in violation of a departmental regulation which required that at least two officers be present prior to transferring a prisoner from one cell to another. Allen violated that regulation by attempting to handle a prisoner alone, resulting in the altercation and minor injuries. Tr. 223-224. The physical abuse complaint from Mrs. Jean Deblock could not be substantiated and was not sustained. Tr. 221, 222. Mrs. Deblock testified at the trial that she was abused and threatened by Allen after being stopped in her car on an interstate highway. After Allen gave her a ticket charging her with speeding and no driver's license, she testified she called him a "rotten punk," and that he then

physically abused her. Tr. 120. She was then arrested and taken to jail. Tr. 120. The case went to City Court and Mrs. Deblock was fined and reprimanded by the Judge for using abusive language and not cooperating with the officers. Tr. 128, 137, 139. In 1975 Allen was involved in an incident in which he shot and killed a burglary suspect caught in the act of stealing television sets from a Holiday Inn. Tr. 243-244. The shooting was determined by the Police Department to be justifiable and, after presentation to the Attorney General as to whether it was to go to the Grand Jury, no action was taken. Tr. 157.

Former police officer Joe Davis testified that he had expressed his concerns about Officer Allen to his superior, Captain Moore, by telling Moore that Allen had bragged about the shooting incident in 1975 and also about the use of his "killing gloves." Davis told the captain that he did not want to ride with Allen any more as a fellow officer. Tr. 158. Captain Moore denied that Davis ever expressed concern to him about Allen or that he had objected to riding with him. Tr. 242-243. Moore was familiar with the shooting incident in 1975 involving Allen but did not recall Davis ever telling him of Allen's bragging about the incident or the use of his black gloves. Tr. 243.

Other supervisory officers who had Allen under their command testified that they had no problems with him other than two or three automobile accidents. Tr. 230. They did not notice anything unusual about him in the performance of his duty or in his behavior. Tr. 237. As an officer, he was rated average or a little above. Tr. 230. Both defendant Chapman and Deputy Director Holt testified that nothing in his disciplinary resumé would have given them cause to discharge Allen prior to the incident complained of in this cause. Tr. 192, 222. There were several commendations in Allen's file both from inside the

department and from citizens. Tr. 217-218. In February of 1977, just a month prior to the incident involved in this case, he assisted a lady who was stranded on the interstate at night and took her home. Tr. 218-219. On another occasion he was commended for saving the life of a motorist who was involved in a serious accident on the interstate; while off duty he broke into a burning car to save the driver who was trapped and unconscious. Tr. 219. There were other commendations from commanding officers in regard to job performance, arrests, and the manner in which they were handled. Tr. 219-220.

D. Role of Director Chapman

Defendant Chapman became Police Director of the Memphis Police Department in September of 1976, approximately six months before the incident of March 5, 1977. Tr. 167. Prior to Chapman's appointment, the Internal Affairs Bureau, which handled complaints against police officers, answered directly to the Chief of Police. Tr. 170. Director Chapman began to make changes throughout the department during this six-month period, one of which was to institute a procedure whereby Internal Affairs would answer directly to him. Tr. 172, 173. The Commander of Internal Affairs became a direct advisor to the Director. Tr. 176. Complaints involving serious injuries with respect to the use of firearms, aggravated cases of alleged brutality, allegations of graft or corruption, and other similar matters would be called to the attention of the Director. Tr. 175. The routine matters would be handled at the precinct level by the precinct commander. Tr. 176. The more serious matters would be handled at the Deputy Chief's level, and those deemed most serious would be handled at the Director or Deputy Director's level. Tr. 176. A case such as the one involving the in-

cident of March 5, 1977, would have been heard at the highest level. Tr. 177. Under the procedure set up by Director Chapman there was nothing about Allen's record prior to this incident which, if called to his attention, would have required that any additional action be taken. Tr. 177. In some cases involving officers with questionable records, a transfer could alleviate the situation; however, prior to 1980, the Director was prohibited from taking such action because the union contract prohibited such transfers. Tr. 192. This system was changed at Director Chapman's insistence with good results, because he felt that such transfers could effect a positive change in an officer. Tr. 193. The Director felt so strongly about the needed changes that he insisted on being a part of the labor negotiating team and was a signatory to the contract. Tr. 199. Director Chapman implemented changes to attempt to correct the problem within the Memphis Police Department of officers who were unwilling to come forward and make or confirm allegations against a fellow officer. He established a psychological service program for officers. Tr. 204. He established certain reporting and disciplinary procedures and tightened the lines of responsibility in order that first line supervisors were better able to identify and deal with problems with individual officers. Tr. 204. Chapman conceded that in the history of the Memphis Police Department there were many things that he did not agree with or disapproved of and stated that he aspired to become Police Director in order that he could institute changes. Tr. 208. The Trial Court in its Order commented on the performance by Director Chapman:

The disposition of this case, upon all of the evidence presented at the hearing, does not blind the Court to the fine record of Mr. Chapman. Neither is the Court unaware that the Memphis Police Department is

staffed by very fine men and women. This Court can note with satisfaction the progress made by that Department under the progressive Directorship of Mr. Chapman. A. 26a.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals was correct and should be affirmed. As the Court of Appeals found, this was a lawsuit against a Police Director individually, despite plaintiffs' assertions they sued the Director in his official capacity. The Complaint did not name the City as a defendant, nor did it specify in what capacity defendant Chapman was sued. For that matter, there was never any attempt to bring the City in as a party defendant. Yet throughout the case, Petitioners have participated in an exercise in legal gymnastics to label it as an official capacity action in an apparent attempt to reach the "deep pocket" of the City. An examination of the language in the Complaint leaves little doubt that it was an action against the Police Director individually. Any doubt was clarified in the Court's order on the Motion for Summary Judgment and the Court's framing of the issue which controlled the trial of the case. Unfortunately the Trial Judge reached an inconsistent conclusion in holding defendant Chapman liable in his official capacity, based upon a finding on an issue which could only apply to an action against an individual. If the case had been truly an official capacity action, it would have to have been tried in accordance with the *Monell* standard. Since it was an individual capacity lawsuit, defendant Chapman was entitled to a good faith immunity defense.

This case demonstrates not only the confusion that can arise from trying to distinguish between individual capacity

and official capacity actions but the need for some clarification by the Court. If a party is seeking to impose liability on a municipality or other governmental entity, such should appear clearly in the Complaint. Furthermore, if the entity is to be subject to such an action, it should be a party to the litigation. Obviously it is important in the defense of such a case to be put on notice as to the nature of the action, the relief sought and against whom the relief is being sought, in order that a proper defense can be maintained. This is especially significant since a good faith defense is not available to municipalities in view of the Court's holding in *Owen v. City of Independence*, 445 U.S. 622 (1980).

ARGUMENT

I.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT A POLICE SUPERVISORY OFFICIAL WAS ENTITLED TO A QUALIFIED IMMUNITY DEFENSE BASED UPON GOOD FAITH.

1. The real question involved in this case is whether defendant Chapman was in fact sued in his official capacity and whether the action was maintained against him in his official capacity or individually. The Complaint in this cause named as defendants Robert J. Allen, an employee of the Memphis Police Department; Wyeth Chandler, Mayor of Memphis, and E. Winslow Chapman, Director of Police. App. 4a, 5a. The City of Memphis was not named as a defendant nor was there ever any attempt to amend the pleadings to include the City. Although the Complaint was filed on February 22, 1978, which was prior to this Court's decision in *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978), there was authority existing at the time which would permit a direct action against a municipality pursuant to 28 U.S.C. §1331 and the Fourteenth Amendment to the Constitution. *Amen v. Dearborn*, 532 F.2d 554 (6th Cir. 1976).

The Complaint did not state specifically whether Chandler and Chapman were sued in their individual capacities, official capacities, or both. The alleged basis for the liability of Chandler and Chapman was that they "knew or should have known that Robert J. Allen was not a good and proper person to be entrusted with authority, power and responsibility of a police officer," "that by their con-

tinued employment of Officer Robert J. Allen [they] acted in a manner which was reckless, willful and wanton against the plaintiffs," and that "by this continued employment of Officer Robert J. Allen, defendants Chandler and Chapman have intentionally and under color of state law deprived the plaintiffs of due process of law." Complaint Paragraphs 25, 26; App. 10a, 11a. These are simple allegations of negligent retention involving a single incident, typical of the allegations found in cases brought against supervisory personnel in their individual capacity. *Kostka v. Hogg*, 560 F.2d 37 (1st Cir.1977); *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir.1976); *Williams v. Vincent*, 508 F.2d 541 (2d Cir.1974); *Howell v. Cataldi*, 464 F.2d 272 (3d Cir. 1972); *Page v. Sharpe*, 487 F.2d 567 (1st Cir.1973); *Brown v. U.S.*, 486 F.2d 284 (8th Cir.1973); *Leite v. City of Providence*, 463 F.Supp. 585 (D.R.I.1978). The allegations in the Complaint made no real distinction between Chandler and Chapman, other than that one was Mayor and the other Police Director. App. 10a, 11a. Both were described as supervisory personnel.

2. Pursuant to a motion for summary judgment on behalf of both Chapman and Chandler, the Court entered an Order granting Chandler's motion; although Chapman's motion was denied, the Court granted leave to file a renewed motion if additional discovery showed that there was no genuine issue as to Chapman's lack of knowledge of Officer Allen's dangerous propensities. App. 18a. It was obvious that the Court was considering Chapman and Chandler together in their capacity as supervisory personnel. The issues as to both were exactly the same. If this was in fact an official capacity lawsuit, there would have been no basis for granting a summary judgment for either of these defendants based on the issues before the Court. Certainly in an official capacity lawsuit, Chandler

who was the Mayor of the City would have been the more likely representative and the individual who would have had more influence on the policies of the City. Furthermore, it is apparent that the Court in ruling on the motion considered Chandler and Chapman in their individual capacities when it held as follows:

A §1983 action is not maintainable on a respondeat superior theory against superior officers who have neither caused nor participated in alleged deprivations of constitutional rights committed by subordinates. *Jennings v. Davis*, 476 F.2d 1271 (8th Cir.1973); *Adams v. Pate*, 445 F.2d 105 (7th Cir.1971); *Moore v. Buckles*, 404 F.Supp. 1382 (E.D.Tenn.1975); *Knipp v. Weikle*, 405 F.Supp. 782 (N.D.Ohio1975). See *Shannon v. Lester*, 519 F.2d 76, 81 (6th Cir.1975), indicating that the Sixth Circuit has yet to rule on this question. Cf. *Monell v. Dep't of Social Services*, 436 U.S. 658, 46 U.S.L.W. 4569 (June 9, 1978) (*Monell* held that a municipality could not be held liable under §1983 on a strict respondeat superior theory. The rationale of this holding would seem to preclude respondeat superior liability for superior officials, as well). . . . App. 16a, 17a.

A review of the cases cited by the District Judge in his Order reveals that they were basically actions against supervisory personnel in their individual capacities.

3. In the trial of the case the sole issue was whether Director Chapman should have known that Officer Allen's dangerous propensities created a threat to the rights and safety of citizens. A. 20a. Petitioners in their brief place emphasis on the fact that, in their response to the motion for summary judgment filed by Chapman and in counsel's opening statement, they maintained that Director Chap-

man was being sued in his "official capacity."² In spite of these assertions the record is clear that there was never any effort to amend the pleadings to specifically assert that this was an official capacity action or to redefine the issues. This becomes especially significant in view of the standards by which an official capacity lawsuit must be tried. See *Monell v. New York Department of Social Services*, *supra*, 436 U.S. at 694.

The Trial Court concluded that Director Chapman should have known of Allen's dangerous propensities and found him liable in his "official capacity." A. 21a. Its opinion is inconsistent in that it delineates the issue as being what Director Chapman should have known and then makes a finding that he is liable in his official capacity, clearly ignoring the *Monell* standards which were in effect at the time of the decision.

4. After the Trial Judge made his findings he referred the case to the Magistrate for a hearing on the issue of damages. A. 27a, 28a. Petitioners make a point that, in his Reply Brief on the issue of damages, counsel for defendants relied upon the Trial Judge's decision to avoid an award of punitive damages citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), and that this argument advanced by defendant's counsel made no sense unless he too understood that the award against Chapman in his official capacity was in fact an award against the City of Memphis.³ The Court had ruled the Director was liable in his official capacity, and the Magistrate was making his findings based upon this ruling. It would be naive indeed to believe that counsel would come forward and concede that his client

2. Brief for Pet., 19, 20, 21.

3. Brief for Pet., 24.

was subject to punitive damages because he was individually liable and not liable in an official capacity. Defendant Chapman excepted to the findings of the Magistrate because it was his position he was not liable and therefore not subject to *any* award of damages.⁴

5. The position taken by the plaintiffs before the Court of Appeals was that since this is an action for damages against a party in his official capacity, it is in essence an action against the governmental entity of which the officer is an agent. *Hughes v. Blankenship*, 672 F.2d 403, 406 (4th Cir.1982); *Van Ooteghem v. Gray*, 628 F.2d 488, 496 (5th Cir.1980). In other words, the City of Memphis was liable for the acts of Director Chapman. Furthermore, they contended that since Chapman was acting in his official capacity he was not entitled to qualified immunity. *Familias Unidas v. Briscoe*, 619 F.2d 391, 403 (5th Cir.1980); *Key v. Rutherford*, 645 F.2d 880, 883 n.5 (10th Cir.1981), rehearing denied.

The Court of Appeals disagreed with plaintiffs' reasoning that Chapman was not entitled to a good faith defense, stating that:

The plaintiffs' argument that the qualified immunity is inapplicable simply because they sued Chapman in his official capacity is unavailing. Under *Owen v. City of Independence*, 445 U.S. 622 (1980), a municipality is not entitled to claim the qualified immunity that the city's agents can assert. *But this is a suit against an individual, not the city.* In reality, plaintiffs are attempting to amend their complaint so as to treat the Police Director as though he were the City in order to avoid the qualified immunity which

4. Exception of Defendant E. Winslow Chapman to Report and Recommendation of U. S. Magistrate filed February 12, 1982.

shields Director Chapman. Such an argument is without support in precedent or reason. (Emphasis supplied) A. 39a.

The findings of the Court of Appeals were correct. Regardless of the label placed upon this set of facts by the Trial Court and plaintiffs, this is nothing more than an action against an individual who at the time was acting as an official of the city. This is evident from the way the case was originally filed and the way it was tried. To hold the city liable in this instance would be to find it liable because it is the employer of Director Chapman. It is clear that a municipality is not liable under the theory of respondeat superior for injuries inflicted solely by its agents or employees. *Monell v. New York Department of Social Services*, *supra*. Under the circumstances, Director Chapman was entitled to immunity based upon good faith. *Procunier v. Navarette*, 434 U.S. 555 (1978); *Wood v. Strickland*, 420 U.S. 308 (1975), rehearing denied 421 U.S. 921.

6. After the notice of appeal was filed in this cause on May 20, 1982, Petitioners sought to invoke Rule 25(d), Federal Rules of Civil Procedure, and Rule 43(c), Federal Rules of Appellate Procedure, to substitute the current Director of Police, John D. Holt, for Chapman. This was an obvious attempt to lend credence to their argument that this was an official capacity lawsuit. Petitioners contend that the decision of the Court of Appeals for all practical purposes abrogates these rules. This would be true if this was in fact an official capacity case; however, the finding that this was an action against an individual abrogates application of these rules here.⁵

5. 3B *Moore's Federal Practice*, paragraph 25.09 [3]; paragraph 25.01 [13].

II.

THE CASE WAS NOT TRIED ON THE PROPER STANDARD TO IMPOSE LIABILITY AGAINST THE POLICE DIRECTOR IN HIS OFFICIAL CAPACITY.

If, in fact, an action for damages against a party in his official capacity is in essence an action against the governmental entity of which the officer is an agent, it necessarily follows that the same standards which apply to a direct action against a municipality would apply in this case. In deciding that municipalities may be sued directly under §1983 for constitutional deprivations, the Court in *Monell* held that the liability imposed must be based upon a governmental policy or custom which is proved to be "the moving force of the constitutional violation." 436 U.S. at 694. In order to hold a city liable under §1983 for the unconstitutional actions of its employees, a plaintiff is required to plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right (emphasis supplied). *Batista v. Rodriguez*, 702 F.2d 393 (2d Cir.1983). If the allegations with regard to official policy are insufficient the case cannot be maintained. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Delaney v. Giarrusso*, 633 F.2d 1126 (5th Cir.1981). There is no allegation in the original Complaint with regard to policy or custom, and, even though the original Complaint predates *Monell*, there was never any attempt to amend to conform with *Monell*. As stated herein, *Monell* was decided while this case was pending and before it came to trial. There can be no question that counsel for Petitioner was aware of *Monell*, as is reflected in the pretrial pleadings.⁶ Furthermore, not only is there a requirement for

6. Brief for Pet., 19.

such an allegation in the pleadings, but such allegations must be in some detail. In *Smith v. Ambrogio*, 456 F.Supp. 1130 (D.Conn. 1978), the Court enunciated the pleading requirements beginning at page 1137:

The standard for municipal liability predicated on inaction of senior personnel must be frankly acknowledged as difficult to meet. A claim of this sort should not be initiated unless there is a sufficient factual basis to justify the extensive litigation that such a claim entails. The typical §1983 suit against a police officer for his allegedly unconstitutional action generally involves a single episode. Discovery and trial are entirely manageable. But a claim of municipal liability based on an alleged policy reflected by a pattern of prior episodes will inevitably risk placing an entire police department on trial. Sweeping discovery will be sought to unearth episodes in which allegedly similar unconstitutional actions have been taken, and the trial will then require litigation of every episode occurring in the community that counsel believes can be shown to involve a similar constitutional violation. Even if a trial of that scope is warranted by a complaint that does allege overt acts with requisite particularity, see *Lewis v. Kugler* [446 F.2d 1343, 1345 (3d Cir. 1971)] (complaint contained "detailed factual recitations relating to 25 separate incidents"), neither a federal court nor a municipality should be burdened with such an action unless a detailed pleading is presented.

This sole issue upon which the case was tried was whether Director Chapman should have known of Officer Allen's dangerous propensities, not whether there was a municipal policy or custom which resulted in a deprivation of constitutional rights. Where the injury did not arise from the execution of a governmental policy or custom,

the defendant cannot be held liable in his official capacity. *Hughes v. Blankenship*, *supra*, 672 F.2d at 406. The fashion in which the case was maintained clearly demonstrates that it was an individual capacity lawsuit.

In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the district court categorized plaintiffs' §1983 action against various state officials as being, in actuality, an action against the state, barred under the Eleventh Amendment. After analyzing plaintiffs' allegations in their complaints, the Supreme Court reversed, noting that "petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* for what they claim—but have not yet established by proof—was a deprivation of federal rights by these defendants under color of state law." 416 U.S. at 238.

The Complaint herein demonstrates that the action was brought only against individuals, Mayor Wyeth Chandler and Police Director Winslow Chapman, alleging that they "knew or should have known that Robert J. Allen was not a good and proper person to be entrusted with the authority, power and responsibility of a police officer." App. 10a. Basically, the Complaint alleges defendants Chandler and Chapman negligently retained Allen as a police officer. There was no allegation of a policy, practice, or custom of the defendants or the City of Memphis that deprived plaintiffs of constitutional rights. The Complaint sought damages only, no declaratory or injunctive relief. App. 11a-12a.

Although the Complaint herein was filed prior to the Court's holding in *Monell* that municipalities could be sued under §1983, plaintiffs never sought to amend their pleadings to allege a policy, practice, or custom, as was done, for example, by plaintiff in *Key v. Rutherford*, *supra*, 645 F.2d at 881 n.1.

In *DeVasto v. Faherty*, 658 F.2d 859 (1st Cir.1981), plaintiff's attempt to amend three months' prior to trial, in order to add the city as a defendant and allege an unconstitutional "practice, custom or policy," was denied by the district court, which held that the city had already proven its entitlement to the qualified immunity of good faith. Relying on the intervening decision of *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court of Appeals reversed, holding that the plaintiff should have been allowed to amend his complaint.

Where plaintiffs have failed to allege or prove unconstitutional practices, policies, or customs, and have therefore failed the standard of proof required by *Monell* against a local government, dismissals have been properly allowed. *Berry v. McLemore*, 670 F.2d 30, 32-34 (5th Cir. 1982); *Harris v. City of Roseburg*, 664 F.2d 1121, 1130 (9th Cir.1981); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1388 (11th Cir.1981), *rehearing and rehearing en banc denied* (1982); *Richardson v. City of Indianapolis*, 658 F.2d 494, 501 (7th Cir.1981); *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1323 (5th Cir.1980); *Tyler v. Woodson*, 597 F.2d 643, 644 (8th Cir.1979).

Even if plaintiffs herein were correct that an action against the police director in his "official capacity" was the equivalent of an action against the city, their failure to allege or prove a policy, practice, or custom of the city that resulted in the alleged constitutional deprivation is a fatal defect.

The Sixth Circuit Court of Appeals clearly understood that plaintiffs were attempting to amend their Complaint *post-trial* to add the city as a defendant. Despite plaintiffs' references before the trial court to "official capacity," the record below inescapably demonstrates that all

parties understood that the *only* issue was whether or not Director Chapman should have known of Officer Allen's dangerous propensities. Between the decision in *Monell* and the trial of this cause, a period of approximately three years, plaintiffs never sought by amendment to add the city as a defendant or to make additional allegations of policy, practice, or custom. As the standard for liability was based on assertions of individual, not municipal, culpability, the Sixth Circuit Court of Appeals was correct in holding that as a matter of law Director Chapman was entitled to the qualified immunity of good faith.

III.

THE DECISION OF THE COURT OF APPEALS DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS.

The Court of Appeals' opinion in this case is not in conflict with the other circuits. As the Court said, "... this is a suit against an individual, not the City." A. 39a. No official policy or custom is involved. There is no real inconsistency with the decisions of the Fourth, Fifth, Seventh, and Tenth Circuits, or for that matter with the decisions of this Court in *Monell* and *Owen*, *supra*.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

HENRY L. KLEIN

Staff Attorney - Attorney of Record
for Respondent

1500 First Tennessee Building
Memphis, Tennessee 38103
901/523-2363

CLIFFORD D. PIERCE, JR.
City Attorney

CHARLES V. HOLMES
Senior Assistant City Attorney

PAUL F. GOODMAN
Assistant City Attorney
314-125 North Mid-America Mall
Memphis, Tennessee 38103
(901) 528-2614
Attorneys for Respondent

REPLY BRIEF

OCT 25 1984

IN THE
Supreme Court of the United States

ALEXANDER L. STEVAS
CLERK

OCTOBER TERM, 1984

ELIZABETH BRANDON, *et al.*,

Petitioners,

v.

JOHN D. HOLT, etc., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

ELIZABETH A. MCKANNA
686 W. Clover Drive
Memphis, Tennessee 38119

G. PHILIP ARNOLD
300 E. Main Street
P.O. Box 760
Ashland, Oregon 97520

WILLIAM E. CALDWELL
P.O. Box 60996
Fairbanks, Alaska 99706

J. LEVONNE CHAMBERS
ERIC SCHNAPPER*
NAACP Legal Defense and
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioners

*Counsel of Record

29/84

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| I. The Director of Police Was Sued In His Official Capacity | 3 |
| II. The District Court Findings Satisfy the Requirements of <u>Monell v. New York Department</u> <u>of Social Services, 436 U.S.</u> <u>658 (1978)</u> | 9 |
| Conclusion | 26 |

TABLE OF AUTHORITIES

Cases:

| | |
|---|----|
| Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) | 11 |
| Conley v. Gibson, 355 U.S. 41 (1957) | 6 |
| Family Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) | 13 |
| Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982) | 15 |
| Katris v. City of Waukegan, 498 F. Supp. 48 (N.D. Ill. 1980) ... | 15 |
| Kingsville Independent School Dis- trict v. Cooper, 611 F.2d 1109 (5th Cir. 1980) | 15 |
| Means v. City of Chicago, 535 F. Supp. 455 (N.D. Ill. 1982) | 24 |

| | <u>Page</u> |
|---|-------------|
| Monell v. New York Department of Social Services, 436 U.S. 658 (1978) | 9-20 |
| Peters v. Township of Hopewell, 534 F. Supp. 1324 (D.N.J. 1982) | 15 |
| Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980) | 13 |
| Yick Wo v. Hopkins, 118 U.S. 356 (1886) | 18 |
| <u>Rules:</u> | |
| Rule 8, Federal Rules of Civil Procedure | 6,23 |
| Rule 9, Federal Rules of Civil Procedure | 6 |
| Rule 12, Federal Rules of Civil Procedure | 7 |
| Rule 15, Federal Rules of Civil Procedure | 8,22 |
| Rule 16, Federal Rules of Civil Procedure | 7,23 |
| Rule 26, Federal Rules of Civil Procedure | 24 |
| Rule 33, Federal Rules of Civil Procedure | 7 |

| | <u>Page</u> |
|--|-------------|
| <u>Other Authorities:</u> | |
| 42 U.S.C. § 1983 | 11,12,18 |
| Restatement of the Law of Agency (Second) (1958) | 19 |
| J. Story, Commentaries on the Law of Agency (1839) | 19 |
| Congressional Globe, 42nd Cong., 1st Sess. (1871) | 19,25 |
| "Civil Rights Litigation after Monell", 79 Colum. L. Rev. 213 (1979) | 16 |

No. 83-1622

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

ELIZABETH BRANDON, et al.,

Petitioners,

v.

JOHN D. HOLT, etc., et al.,

Respondents.

On Writ of Certiorari to the United
States Court of Appeals for the
Sixth Circuit

=====

REPLY BRIEF FOR PETITIONERS

=====

In our principal brief we noted that the district court had held liable for damages the Memphis Police Director "in his official capacity", and argued that

such a judgment runs against the city of Memphis, not the Director personally. We thus urged that the court of appeals erred in holding that an action against such an official "in his official capacity ... is a suit against the individual, not the city". (Pet. App. 39a; see also id. at 46a.) The respondent acknowledges that the district court held the Police Director liable "in his official capacity" (R. Br. 8, 13), but does not attempt to defend the sixth circuit's opinion that such a judgment imposes personal liability on the Director.

Respondent advances in this Court, instead, a contention never raised by it in either court below, that the district court erred in imposing liability on the Police Director in his "official capacity", and should instead have held him liable in his "individual capacity". Counsel for respondent clearly and

deliberately avoided making such argument in the courts below, and is for that reason precluded from raising that contention here. In the event, however, that the Court may wish to consider nisi prius whether this contention affords an alternative basis for affirming the decision of the court of appeals, we set forth our views on respondent's position.

I. THE DIRECTOR OF POLICE WAS SUED
IN HIS OFFICIAL CAPACITY

Respondent asserts that the "real question" presented by this case is whether this action against the Director of Police "was maintained against him in his official capacity or individually." (R. Br. 10) Had petitioners expressly and consistently reiterated throughout the district court proceedings that we sought only to hold Director Chapman liable personally, the entry of judgment against

Chapman in his official capacity might have been improper. But there was in this case no such misrepresentation of the relief sought by petitioners. Respondent expressly disavows any such claim that it were misled, acknowledging, albeit in a somewhat contentious fashion, that "throughout the case, Petitioners have participated in an exercise in legal gymnastics to label it as an official capacity action...." (R. Br. 8) (Emphasis added). The court of appeals at three different points in its opinion emphasized that Chapman had in fact been sued in his official capacity. (Pet. App. 30a, 39a, 46a) We noted in our principal brief that counsel for petitioners made crystal clear more than a year and half prior to trial that Chapman was sued in his official capacity only, and that counsel reiterated that position throughout the trial itself. (P. Br. 19-22)

Respondent appears to suggest in the alternative that, even though this action was expressly and successfully litigated against Chapman in his official capacity, no judgment can be entered against Chapman in that capacity for the sole reason that the original complaint failed to specify whether Chapman was named as a defendant in his official or individual capacity. Respondent, however, cites no authority for this unique per se pleading rule, and no basis for it can readily be imagined.

Nothing in the Federal Rules of Civil Procedure requires that a complaint must expressly state in what capacity a defendant is sued. The framers of the Rules clearly knew how to require that particular matters be pleaded with special specificity, and several such pleading requirements are set forth in Rule 9(b)-(h). The capacity in which a defendant is sued, like all other matters

not encompassed by Rule 9, is governed by the direction in Rule 8(e)(1) that "[n]o technical forms of pleading ... are required." See Conley v. Gibson, 355 U.S. 41 (1957). If a complaint fails to specify the capacity in which a government official is sued, respondent suggests that the plaintiff must thereafter be limited to relief against the official in his personal capacity. But nothing in the Federal Rules of Civil Procedure suggests that such a complaint must be construed in the manner least favorable to the defendant personally, or that any such ambiguity in the complaint can be resolved only by filing an amended complaint.

If the defendant in a civil action is genuinely uncertain as to the meaning or scope of the complaint, the Federal Rules provide a variety of remedies. In some circumstances Rule 12(e) authorizes the filing of a motion for a more definite

statement. Clarification of the nature of the issues in dispute may be sought at a pretrial conference under Rule 16(c)(1). Interrogatories asking that a party state the nature of its contentions may be served pursuant to Rule 33.

In this case, however, respondent does not claim that it did not actually know that petitioners was seeking relief against the Police Director in his official capacity. Petitioners reiterated the nature of the relief they were seeking with such frequency as to preclude any such assertion of actual ignorance. A defendant who is well aware of the nature of a plaintiff's claims cannot as here silently await the completion of the trial of those claims and only then object to the language of the original complaint. In

such a case Rule 15(b)¹ directs that any defect or omission in the complaint be disregarded.

II. THE DISTRICT COURT FINDINGS SATISFY THE REQUIREMENTS OF MONELL v. NEW YORK DEPARTMENT OF SOCIAL SERVICES, 436 U.S. 658 (1978).

The district court's imposition of liability in this case was predicated on a number of detailed findings regarding the Memphis Police Department practices which led to the attack on petitioners. The trial court concluded, inter alia, that violent officers were never dismissed, that transfers were never used as a disciplinary measure to punish abusive officers or to get them off the streets, that police officers throughout the

¹ "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

Department adhered to a code of silence which precluded disclosing or confirming the existence of abuses by their comrades, and that the Police Director was deliberately insulated from any information about civilian complaints of police brutality. (Pet. App. 7-24) We discuss these findings, and the portions of the record which support them, at pp. 7-18 of our principal brief.

Respondent does not deny the existence of these practices. On the contrary, respondent frankly acknowledges their existence, suggesting only that efforts were made to alter the practices after they had resulted in the assault on petitioners. (R.Br. 7) Respondent nonetheless contends that these admitted practices are insufficient to provide a basis for the imposition of liability, insisting that none of these practices were "official policies" as required by

Monell v. New York Department of Social Services, 436 U.S. 658 (1978). Although the basis of this argument is not fully articulated, respondent appears to insist that the city of Memphis cannot be held liable for the actions of the city Police Director because the Police Director is no more than a mere employee of the city. (R. Br. 15; Br. in Opp. 6) Respondent's contention is based on a clear misreading of Monell.

Monell overruled this Court's earlier decision in Monroe v. Pape, 365 U.S. 167 (1961), that municipalities could not be named as defendants in civil rights actions brought under 42 U.S.C. § 1983.²

² The complaint in this action sought relief both under section 1983 and directly under the Fourteenth Amendment. (J. App. 3a) See Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Nothing in Monell suggests that the section 1983 requirement of an official policy or custom, rooted as it is in the particular legislative history of section 1983, would be applicable to a Bivens action. Since, however, that requirement is clearly met in

While announcing that municipalities could be held liable in section 1983 actions, Monell also held that such liability could not be imposed on a mere showing that the individual responsible for causing a violation of the constitution happened to be a city employee. Monell concluded that the common law rule of respondeat superior was inconsistent with the legislative history of section 1983, and that damages may be awarded only if the constitutional violation at issue was caused by "a government's policy or custom." 436 U.S. at 694.

Monell indicated that this requirement of a government custom or policy could be satisfied in several different ways. First, a policy statement, ordinance, regulation or decision might be

this case, there is no need to consider its relevance, if any, to a case such as Bivens.

formally adopted by the city's highest ranking official or officials. See 436 U.S. at 690. As to any particular decision regarding government conduct, there must be one person, or group of persons, who can make the ultimate determination as to what will occur. That individual or group, whom the lower courts

have labeled the "final authority",³ may exercise legislative, executive, or judicial functions. The actions of such a final authority are necessarily official policies within the meaning of Monell.

³ See, e.g. Schneider v. City of Atlanta, 628 F.2d 915, 920 (5th Cir. 1980); Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980). In Familias Unidas the unconstitutional conduct was that of a county judge. In imposing liability on the county, the Fifth Circuit reasoned:

"[T]he judge -- like other elected county officials, such as the sheriff and treasurer -- holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein.... Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those... for which the county may be held responsible under section 1983."

Monell also recognized that in any governmental body much of the responsibility for making official policy or decisions will ordinarily be delegated by the mayor, city council, or other final authorities to lower ranking government officials.⁴ The policy at issue in Monell, for example, had been adopted by the Assistant Deputy Administrator for Personnel Management of a city agency.⁵ Although the record in Monell contained no formal chain of delegation reaching back to the mayor or city council, the author-

⁴ The lower courts have consistently recognized that Monell is satisfied where the official responsible for the constitutional violation had been exercising delegated authority or discretion. Hearn v. City of Gainesville, 688 F.2d 1328, 1334 (11th Cir. 1982); Kingsville Independent School District v. Cooper, 611 F.2d 1109, 1112 (5th Cir. 1980); Peters v. Township of Hopewell, 534 F. Supp. 1324 (D.N.J. 1982); Katris v. City of Waukegan, 498 F. Supp. 48, 51 (N.D. Ill. 1980).

⁵ Monell v. Department of Social Services, stipulation dated May 16, 1974, p. 2.

ity of that relatively minor official to adopt the personnel policy at issue in Monell was amply demonstrated by the fact that his decision was neither disregarded by his subordinates nor overturned by his superiors. Under these circumstances this Court had no difficulty in recognizing that the actions of the Assistant Deputy Administrator" could fairly be said to represent official policy." 436 U.S. at 694. In cities and counties where policy making authority is often delegated in a casual manner far different from the formal allocation of responsibility at the higher levels of federal agencies, the actual authority traditionally and overtly exercised by a particular official will often be the best guide as to the nature of his or her role in framing official policies or taking official action. See "Civil Rights Litigation after Monell," 79 Colum. L. Rev. 213, 219 (1979).

Monell also concluded that a city or county could be held liable for constitutional violations caused by an official custom. This rule has its roots in the language of section 1983 itself, which provides a cause of action for certain conduct " ... under color of any law, statute, ordinance, regulation, custom, or usage of any State..." The Court in Monell noted that in framing section 1983 Congress had "included such customs and usage because of persistent and widespread discriminatory practices by state officials." 436 U.S. at 691. Monell emphasized that the actual practices of government officials were often a better indication of official policy than ordinances or regulations which ignored or even forbade those practices:

It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books.... Settled state practice ... can establish what is

state law.... Deeply embedded traditional ways of carrying out state policy ... are often tougher and truer law than the dead words of the written text.

436 U.S. at 691 n. 56. See Yick Wo. v. Hopkins, 118 U.S. 356 (1886).

The Congress that framed section 1983 was particularly concerned about the widespread refusal of local law enforcement officials in 1871 to enforce state criminal laws against members of the Ku Klux Klan and others who attacked blacks and Republicans. The nominal policy of the former rebel states, as announced by their statutes, was to protect all citizens from violence without regard to their race or party; the actual policies of those states, however, were very different. As one member of the forty-second Congress noted, "Sheriffs, having eyes to see, see not; judges having ears

to hear, hear not...."⁶ A practice is to be deemed an official custom, inter alia, if it occurs with sufficient frequency and notoriety as to make it known to responsible supervisory officials and those officials decline to take effective action to end that practice.⁷

The practices identified by the district court as causing the constitutional violation at issue in this case clearly satisfy the requirements of Monnell. The policy of not dismissing violent officers was embraced by both the

⁶ Cong. Globe, 42nd Cong., 1st Sess. 78 (1871) (Rep. Perry).

⁷ See Restatement Of The Law Of Agency (Second) § 43 (1958). Comment (a) notes, "Persons ordinarily express dissent to acts done on their behalf which they have not authorized or of which they do not approve." That was the view of agency law which prevailed in 1871. See J. Story Commentaries on the Law of Agency. ¶ 87 (1839) (authority of agent can arise "by implication by numerous acts, done by the agent with the tacit consent or acquiescence of the principle.").

Police Director and the Memphis Civil Service Commission. The policy of not transferring officers for disciplinary reasons was adhered to by the Police Director and expressly agreed to by the Mayor. The policy of insulating the Police Director from all civilian complaints of misconduct was adopted, as it was later modified, by the Police Director himself. Respondent does not suggest that the Mayor, Police Director or Civil Service Commission lacked the authority to adopt any of these well established and well known policies.

The code of silence that prevailed among Memphis police officers is precisely the type of custom with which the framers of section 1983 were concerned. That code permitted and condoned police misconduct as surely as a written rule expressly immunizing officers from any inquiry into acts of violence. If Memphis had any

nominal rule forbidding police violence, it was little more than a dead letter. The police officers who knew of the mistreatment of civilians uniformly suppressed that information, and their supervisors, although well aware that criminal conduct was being concealed in this manner, made no apparent effort to impose sanctions on any of the officers involved in the cover up.

Respondent suggests in the alternative that even if the findings of the district court are sufficient under Monell, this action must nonetheless be dismissed because the original complaint purportedly lacked sufficiently precise allegations regarding those official policies. This contention, first raised in a brief filed in this Court in August 1984, some four years after the trial, comes far too late in the day. Petitioners expressly announced at the outset

of the trial their intention to prove a policy under Monell, and proceeded to do so, without any recorded objection by the respondent. When an issue is thus tried with the implicit consent of the parties, any failure to raise those issues in the pleadings is necessarily waived. Rule 15(b), Federal Rules of Civil Procedure.

Nothing in the Federal Rules, moreover, suggests that a section 1983 claim against a municipality must be pleaded with a greater degree of specificity than any other type of claim. Respondent apparently suggests that a plaintiff must identify in his or her complaint each and every policy which is to be proved at trial, and specify as well what evidence will be offered to establish the existence of those policies. But a civil complaint is not required to have the specificity and detail that might, after the completion of discovery,

characterize a Rule 16 pretrial order; the complaint need only contain "a short and plain statement of the claim," Rule 8(a)(2), F.R.C.P. A plaintiff will ordinarily lack prior to discovery the type of detailed information about the defendant's conduct which respondent insists be alleged in advance in the complaint.⁸ In the instant case, for example, it was not until defendant Chapman was deposed under oath that the practices identified by the district court were or could have been known to petitioners or any other individuals injured by those practices.

⁸ "We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery acts to which he or she was not personally exposed, but which provide evidence necessary to sustain the plaintiff's claim...." Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982).

Respondent suggests that a plaintiff aggrieved by a violation of the Constitution should be barred from court unless the plaintiff alleges in his or her complaint the type of detailed information that Rules 26-37 implicitly recognize cannot be obtained without the use of depositions, interrogatories, and other forms of discovery. Such a requirement would establish for civil rights cases an unmeetable pleading requirement radically unlike anything demanded of plaintiffs in mundane commercial litigation, far more harsh and indefensible than the arcane rules of common law pleading, and entirely inconsistent with the intent of the framers of section 1983 that that statute "throw [] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired."⁹

⁹ Cong. Globe, 42nd Cong., 1st Sess. 376 (1871) (Rep. Lowe). See also id. at 459 (remarks of Rep. Coburn) ("Whenever,

CONCLUSION

For the foregoing reasons the judgment and opinion of the court of appeals should be reversed.

Respectfully submitted,

ELIZABETH A. MCKANNA
686 W. Clover Drive
Memphis, Tennessee 38119

G. PHILIP ARNOLD
300 E. Main Street
P.O. Box 760
Ashland, Oregon 97520

WILLIAM E. CALDWELL
P. O. Box 60996
Fairbanks, Alaska 99706

J. LeVONNE CHAMBERS
ERIC SCHNAPPER*
NAACP Legal Defense and
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioners
*Counsel of Record

then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors....")